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THE ORIGINS AND LEGACY OF THE FOURTH AMENDMENT REASONABLENESS-BALANCING MODEL

Kit Kinports[†]

ABSTRACT

The overwhelming majority of the Supreme Court's Fourth Amendment cases over the past fifty years have been resolved using a warrant-presumption model, which determines the constitutionality of a search or seizure by asking whether law enforcement officials had probable cause and a warrant, or some exception to those requirements. But three decisions, beginning in 2001, mysteriously deviated from that approach and applied a reasonableness-balancing model, upholding the searches in those cases after considering the totality of the circumstances and weighing the competing government interests against the defendant's privacy interests. This balancing approach has justifiably been criticized as amorphous, subjective, and overly deferential to government.

No announcement or explanation accompanied the Justices' departure from the warrant-presumption model. In fact, the Court claimed that it was simply following its "general Fourth Amendment approach."¹ Some scholars likewise believe that the Court's Fourth Amendment jurisprudence has reflected this balancing approach for decades. And other academics fear that the Court has now completely abandoned the warrant-presumption model and replaced it with the reasonableness-balancing model.

This Article maintains that both of those claims are overstated. First, in exploring the origins of the reasonableness-balancing model, the Article concludes that, prior to 2001, balancing was largely limited to Fourth Amendment cases requiring the Court either to decide on the creation and scope of categorical exceptions to the warrant requirement or to rule on the constitutionality of administrative inspections. Although general language suggesting a wider role for the balancing test can be found in a few Supreme Court decisions, those opinions derived support for a balancing analysis exclusively from warrant-presumption model cases, did not stray far from that model, or have

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1. *United States v. Knights*, 534 U.S. 112, 118 (2001).

been undermined by later decisions. As a result, neither the Justices nor others have been able to find much in the way of precedent supporting an ad hoc balancing approach.

Turning second to the legacy of the reasonableness-balancing model, the Article analyzes both Supreme Court and lower court decisions postdating the trilogy of opinions. This review finds that the Supreme Court has continued to apply the warrant-presumption model in almost every Fourth Amendment case other than the three outlier opinions. The record in the lower federal and state courts is more mixed, and some courts have arguably attempted to extend the reasonableness-balancing model into a few limited contexts beyond those involved in the three Supreme Court decisions. In general, however, the lower courts have been reluctant to apply the reasonableness-balancing model aggressively and expand it into new arenas—with one exception, foreign intelligence and national security searches. Moreover, a number of lower court opinions have refused to engage in a balancing analysis or, though applying the balancing approach, have decided that the relevant law enforcement interests were outweighed by the defendant's privacy interests.

While the Article finds that the reasonableness-balancing model has not dramatically altered the Fourth Amendment landscape—at least not yet—that conclusion does not address the shortcomings of the balancing test. Most of the lower court opinions declining to use a balancing approach or balancing in favor of defendants have generated disagreement, either within the court itself or with other courts, and therefore could just as easily have been decided the other way. Moreover, all of the cases in which defendants prevailed under the balancing model were, or could have been, resolved under the warrant-presumption model as well. Given the vagueness and malleability of the reasonableness-balancing model, and the absence of any principled standard suggesting when it applies, the Article advocates that courts continue adhering to the warrant-presumption model and exclude evidence discovered during warrantless searches that do not fall within one of the categorical exceptions to the warrant requirement.

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INTRODUCTION

The Fourth Amendment consists of two clauses joined by the word “and”: the Reasonableness Clause prohibits “unreasonable searches and seizures,”² and the Warrant Clause prescribes the prerequisites for a warrant.³ Given the “curious[]” way the Amendment is phrased,⁴ the relationship between the two provisions is “almost entirely inscrutable,”⁵ a “syntactical mystery.”⁶ On its face, the Amendment does not specify when a warrant is required, and its constitutional history is “foggy.”⁷

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2. U.S. CONST. amend. IV (providing that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated”).
 3. *See id.* (requiring “probable cause, supported by Oath or affirmation,” as well as a particular description of “the place to be searched” and “the persons or things to be seized”).
 4. George C. Thomas III, *The Common Law Endures in the Fourth Amendment*, 27 WM. & MARY BILL RTS. J. 85, 87 (2018).
 5. Sam Kamin & Justin Marceau, *Double Reasonableness and the Fourth Amendment*, 68 U. MIAMI L. REV. 589, 595 (2014).
 6. H. Richard Uviller, *Reasonability and the Fourth Amendment: A (Belated) Farewell to Justice Potter Stewart*, 25 CRIM. L. BULL. 29, 33 (1989).
 7. TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 24 (1969).

Some scholars take the position that the two clauses are “disjunctive”⁸ and “independent” of each other,⁹ that the Reasonableness Clause is the predominant clause and the Warrant Clause simply provides safeguards to protect against abusive warrants.¹⁰ Under this view, the Fourth Amendment proscribes unreasonable searches and seizures but does not require, or presumptively require, probable cause and a warrant.¹¹ Under the contrary view, the two clauses are “conjunctive”¹² and “interdependent”¹³: the Warrant Clause is predominant and constitutionally mandates a warrant, at least in certain cases.¹⁴

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8. Erin Murphy, *License, Registration, Cheek Swab: DNA Testing and the Divided Court*, 127 HARV. L. REV. 161, 183 (2013).
 9. Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925, 927 (1997).
 10. *See id.* at 927–28.
 11. *See, e.g.,* TAYLOR, *supra* note 7, at 46–47 (concluding that those who “view[] the fourth amendment primarily as a requirement that searches be covered by warrants . . . have stood the amendment on its head”); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759, 771 (1994) (arguing that the “words” of the Fourth Amendment “do not require warrants, probable cause, or exclusion of evidence, but they do require that all searches and seizures be reasonable,” and that the Warrant Clause “does not require, presuppose, or even encourage warrants—it *limits* them”).
 12. Murphy, *supra* note 8, at 183.
 13. Maclin, *supra* note 9, at 927.
 14. *See, e.g., id.* at 938 (criticizing the disjunctive view of the Fourth Amendment as based on a “facile and categorical interpretation” of the language that is not “supported by history,” and concluding that constitutional history “tells us more than the nebulous language of the text”); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 824 (1994) (arguing that the Fourth Amendment’s “use of the term ‘reasonable’ . . . positively invites constructions that change with changing circumstances” and therefore that “the construction of the . . . ‘reasonableness’ clause should properly change over time to accommodate constitutional purposes more general than the Framers’ specific intentions”). Pointing out that a comma separates the Fourth Amendment’s clauses, several scholars observed that “it would be easier to argue textually that the two clauses are independent” if a semicolon had been used instead. 1 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE § 4.02, at 51 (6th ed. 2013). *But see* State v. Short, 851 N.W.2d 474, 483 (Iowa 2014) (concluding that the semicolon between the two clauses in the state constitution’s version of the Fourth Amendment “suggests the framers believed that there was a relationship between the reasonableness clause and the warrant clause”). For a summary of the historical and policy arguments advanced in this scholarly debate, see 1 DRESSLER & MICHAELS, *supra*, § 10.01, at 157–64.

Although the Supreme Court has not directly engaged this academic debate,¹⁵ most of its Fourth Amendment decisions over the past fifty years have followed a warrant-presumption model, which deems warrantless searches and seizures “*per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions.”¹⁶ Starting in 2001, however, the Court has on three occasions deviated from that framework and applied an ad hoc reasonableness-balancing model, determining the constitutionality of a search by “examining the totality of the circumstances” and balancing

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15. Cf. *Atwater v. City of Lago Vista*, 532 U.S. 318, 336–37 (2001) (discussing this literature in analyzing the Framers’ views of warrantless misdemeanor arrests). The debate has been referenced, and the disjunctive interpretation of the Fourth Amendment endorsed, by some of the Justices in separate opinions. See *Carpenter v. United States*, 138 S. Ct. 2206, 2243–44 (2018) (Thomas, J., dissenting); *California v. Acevedo*, 500 U.S. 565, 581–84 (1991) (Scalia, J., concurring in the judgment); *Robbins v. California*, 453 U.S. 420, 438 (1981) (Rehnquist, J., dissenting); *Payton v. New York*, 445 U.S. 573, 621 (1980) (Rehnquist, J., dissenting); *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 326–28 (1978) (Stevens, J., dissenting); *Coolidge v. New Hampshire*, 403 U.S. 443, 492 (1971) (Harlan, J., concurring).

In addition, the Justices addressed the issue in several search-incident-to-arrest opinions that predated this academic commentary. Compare *United States v. Rabinowitz*, 339 U.S. 56, 65–66 (1950) (observing that “[t]he mandate of the Fourth Amendment is that the people shall be secure against *unreasonable* searches” and that “[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable,” a “criterion” that “depends upon the facts and circumstances—the total atmosphere of the case”), *overruled on other grounds by* *Chimel v. California*, 395 U.S. 752 (1969), and *Harris v. United States*, 331 U.S. 145, 150 (1947) (noting that “[t]he Fourth Amendment has never been held to require that every valid search and seizure be effected under the authority of a search warrant”; rather, “it is only unreasonable searches and seizures which come within the constitutional interdict” and “[t]he test of reasonableness cannot be stated in rigid and absolute terms”), *overruled on other grounds by* *Chimel*, 395 U.S. 752 (1969), with *Rabinowitz*, 339 U.S. at 70 (Frankfurter, J., dissenting) (arguing that “[o]ne cannot wrench ‘unreasonable searches’ from the text and context and historic content of the Fourth Amendment,” and, “[w]hen the Fourth Amendment outlawed ‘unreasonable searches’ and then went on to define the very restricted authority that even a search warrant . . . could give, the framers said with all the clarity of the gloss of history that a search is ‘unreasonable’ unless a warrant authorizes it, barring only exceptions justified by absolute necessity”), and *Harris*, 331 U.S. at 161–62 (Frankfurter, J., dissenting) (reasoning that “[u]nreasonable’ is not to be determined . . . in isolation” but rather in light of the “historic experience” underlying the Fourth Amendment, and “[t]his means that, with minor and severely confined exceptions, . . . every search and seizure is unreasonable when made without . . . a validly issued warrant”).

16. *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

“the degree to which [the search] intrudes upon an individual’s privacy” against “the degree to which it is needed” to serve “legitimate governmental interests.”¹⁷ Two of those opinions, *United States v. Knights* and *Samson v. California*, permitted warrantless searches conducted pursuant to a search condition imposed as part of probation or parole,¹⁸ and the third, *Maryland v. King*, allowed warrantless DNA testing following an arrest.¹⁹

The Supreme Court has never bothered to justify its decision to abandon the warrant-presumption model in those three (and only those three) cases.²⁰ In fact, the Court has denied that it deviated from precedent, referring to the balancing test as the “ordinary” approach to Fourth Amendment jurisprudence.²¹ A cynic might say that the Justices resort to the reasonableness-balancing model when they want to uphold the constitutionality of a search that does not easily fall within one of the traditional exceptions to the warrant requirement.²² Whatever the explanation, the Court has never defined, even roughly, which cases should be evaluated “by reference to the proposition that the ‘touchstone of the Fourth Amendment is reasonableness.’”²³

The reasonableness-balancing model has understandably engendered a good deal of academic criticism. It has been called “mushy,”²⁴ “murky,” and “almost entirely free of content.”²⁵ Pointing out that the

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17. *United States v. Knights*, 534 U.S. 112, 118–19 (2001) (first quoting *Ohio v. Robinette*, 519 U.S. 33, 39 (1996); and then quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).
 18. *Samson v. California*, 547 U.S. 843, 846 (2006); *Knights*, 534 U.S. at 118.
 19. *Maryland v. King*, 569 U.S. 435, 440–41 (2013).
 20. More recent Supreme Court opinions have returned to the warrant-presumption model, again without offering any explanation as to when each model applies. See *infra* notes 64 & 274 and accompanying text.
 21. *Knights*, 534 U.S. at 122.
 22. For an analysis of the applicability of the traditional warrant exceptions in the three cases, see *infra* notes 37–44, 56–57, 67–77 and accompanying text.
 23. *King*, 569 U.S. at 448 (quoting *Samson*, 547 U.S. at 855 n.4).
 24. Barry Friedman & Cynthia Benin Stein, *Redefining What’s “Reasonable”*: *The Protections for Policing*, 84 GEO. WASH. L. REV. 281, 307 (2016).
 25. Kamin & Marceau, *supra* note 5, at 591, 602; see also David H. Kaye, *A Fourth Amendment Theory for Arrestee DNA and Other Biometric Databases*, 15 U. PA. J. CONST. L. 1095, 1103 (2013) (arguing that “a rule-based system can provide greater accuracy and predictability in judicial decisionmaking” than a balancing approach); Cynthia Lee, *Reasonableness with Teeth: The Future of Fourth Amendment Reasonableness Analysis*, 81 MISS. L.J. 1133, 1149, 1136 (2012) (observing that the reasonableness model allows the Court to “exercise . . . unguided discretion,” which “can lead to

Supreme Court’s weighing process tends to favor the prosecution, scholars have condemned the model as “rigged”²⁶ and have accused the Court of balancing with its “thumb pressing heavily on the government’s side of the scale.”²⁷ The scholarly community is not unanimous, however,²⁸ and some academics have proposed modifications to the reasonableness-balancing model.²⁹

Although I am persuaded by the critiques of the reasonableness-balancing approach, this Article does not focus on those arguments. Instead, it explores the Court’s uncertain and episodic embrace of the reasonableness-balancing model with two goals in mind: to analyze when the Court started balancing in earnest and to evaluate whether the conversion to the reasonableness model is complete. Some scholars trace the reasonableness-balancing model back to the late 1960s, arguing that the Court “ushered in the era [of] overall reasonableness”³⁰ in its first administrative inspection opinion, *Camara v. Municipal Court*,³¹ and its stop-and-frisk decision the following year in *Terry v.*

inconsistent results” and “enable[] subconscious biases to influence the decision-making process”).

26. Friedman & Stein, *supra* note 24, at 297–98 (pointing out that the Court “almost always compares the overarching goal of the search scheme against a single individual’s privacy interest,” thus comparing “an apple to an orchard”).
27. Thomas K. Clancy, *The Fourth Amendment’s Concept of Reasonableness*, 2004 UTAH L. REV. 977, 1011; *see also* Lee, *supra* note 25, at 1147 (describing the test as “highly deferential” to the government).
28. *See, e.g.*, Orin S. Kerr, *An Economic Analysis of Search and Seizure Law*, 164 U. PA. L. REV. 591, 594, 623 (2016) (arguing that “economics provides a surprisingly helpful lens” to understand Fourth Amendment jurisprudence “as a way to maximize the benefits of criminal law while minimizing the costs of its enforcement,” and pointing out that the reasonableness-balancing model is a “thinly disguised cost-benefit analysis” and therefore “clearly fits the economic perspective”).
29. *See, e.g.*, Lee, *supra* note 25, at 1137, 1159–60 (encouraging the Court to “engage in a more stringent form of reasonableness review”—“reasonableness review with teeth”—and “scrutinize whether the government had good reason for . . . acting without advance judicial authorization” (emphasis omitted)); Alexander A. Reinert, *Public Interest(s) and Fourth Amendment Enforcement*, 2010 U. ILL. L. REV. 1461, 1466, 1464, 1467 (questioning “the conventional wisdom” that the relevant “public and private interests are . . . always at odds with each other,” and arguing that the Court has “ignored” the “collective values in pluralist civic participation and efficient and accurate criminal justice administration”).
30. Reinert, *supra* note 29, at 1469.
31. *Camara v. Mun. Ct.*, 387 U.S. 523 (1967); *see, e.g.*, Friedman & Stein, *supra* note 24, at 290 (charging that “the breach in the doctrinal warrant and probable cause model” began in *Camara*); Kamin & Marceau, *supra* note 5, at 604 (arguing that “no area of Fourth Amendment doctrine

Ohio.³² And some academics charge that the Court has departed almost entirely from the warrant-presumption model—that “totality of the circumstances balancing has become the new normal in Fourth Amendment adjudication.”³³ This Article maintains that both of those claims are overblown.

In developing that argument, the Article proceeds in three parts. After briefly describing the Court’s three reasonableness-balancing model opinions in Part I, Part II analyzes the Court’s earlier case law and maintains that, prior to 2001, balancing was generally confined to cases in which the Justices were either ruling on the creation and scope of categorical exceptions to the warrant requirement or evaluating the constitutionality of administrative inspection schemes. Although general language appears in a few Supreme Court opinions suggesting the balancing test may have a place outside the warrant-presumption framework, those decisions do not provide a solid foundation for the reasonableness-balancing model because they derived support for a balancing analysis solely from warrant-presumption model cases or they did not deviate substantially from that model.

Part III then explores what impact the balancing model trilogy has had on Fourth Amendment jurisprudence, examining subsequent Supreme Court decisions as well as opinions issued by the lower federal and state courts. This survey finds that the warrant-presumption model is still alive and well in the Supreme Court and that the Justices have even declined several invitations to rely on the balancing model. The

provides greater evidence for the ascendancy of reasonableness balancing than the special needs doctrine” introduced in *Camara*).

32. *Terry v. Ohio*, 392 U.S. 1 (1968); *see, e.g.*, Friedman & Stein, *supra* note 24, at 291–92 (maintaining that *Terry* “abandoned the warrant and probable cause model”); Tracey Maclin, *Maryland v. King: Terry v. Ohio Redux*, 2013 SUP. CT. REV. 359, 399 (asserting that *Terry* “embraced” “open-ended balancing analysis”).
33. Kamin & Marceau, *supra* note 5, at 610; *see id.* at 602 (maintaining that “the Court has largely replaced its presumptions with a totality of the circumstances reasonableness test”); *see also* Friedman & Stein, *supra* note 24, at 288 (describing “the collapse” of the warrant-presumption model); Maclin, *supra* note 32, at 399 (arguing that “the balancing analysis adopted in *Terry* eventually became the ‘touchstone of modern Fourth Amendment jurisprudence’” (quoting John Q. Barrett, *Deciding the Stop and Frisk Cases: A Look Inside the Supreme Court’s Conference*, 72 ST. JOHN’S L. REV. 749, 753 (1998))); Reinert, *supra* note 29, at 1470 (characterizing the reasonableness-balancing model as “the current status quo”). *But see* David H. Kaye, *Why So Contrived? Fourth Amendment Balancing, Per Se Rules, and DNA Databases After Maryland v. King*, 104 J. CRIM. L. & CRIMINOLOGY 535, 544, 551 (2014) (calling *Maryland v. King* “part of [a] still-small family,” and noting that the Court had “ventured outside the [warrant-presumption model] entirely” on only “a few previous occasions”); Lee, *supra* note 25, at 1146 (observing that the Court still uses the warrant-presumption model “in the bulk of its cases”).

overwhelming majority of lower court decisions applying the Court's trilogy of opinions involve the same issues addressed in those three cases: searches of parolees and probationers and collection of DNA samples. While a few courts have arguably allowed the balancing approach to creep into a limited number of discrete areas beyond those involved in the three Supreme Court decisions, most notably in cases involving foreign intelligence and national security searches, overall the lower courts are continuing to follow the warrant-presumption model as well. Moreover, the lower courts have not been as deferential to law enforcement as the Supreme Court: some have refused to engage in a balancing analysis, and others have weighed the competing interests in favor of the defendant. Nevertheless, most of those defendant-friendly opinions provoked dissents or disagreements with other courts, and therefore could have been decided the other way. And all of the cases in which prosecutors lost under the balancing model were, or could have been, resolved under the warrant-presumption model as well. Part III closes with an assessment of why the Court created the reasonableness-balancing model and what its future holds, ultimately suggesting that, given the amorphousness and subjectivity surrounding the model and the absence of any principles governing when it should be applied, courts should continue following the warrant-presumption model and suppress evidence uncovered during warrantless searches that do not fall within one of the established exceptions to the warrant requirement.

I. THE REASONABLENESS-BALANCING MODEL TRILOGY

The Supreme Court introduced the reasonableness-balancing model in 2001, in Chief Justice Rehnquist's brief and surprisingly unanimous opinion in *United States v. Knights*.³⁴ At issue in *Knights* was the constitutionality of a search condition that allowed warrantless searches of a probationer's home based on reasonable suspicion rather than probable cause.³⁵ *Knights*, who was on summary probation for a misdemeanor drug offense, was suspected of being involved in arson and various acts of vandalism, and a detective's search of his home uncovered evidence linking him to those crimes.³⁶

The question presented in *Knights* was whether a probationer's "agreement to a term of probation" allowing warrantless searches "constituted a valid consent to a search by a law enforcement officer

34. *United States v. Knights*, 534 U.S. 112, 118–19 (2001).

35. *See id.* at 114.

36. *See id.* at 114–15; *United States v. Knights*, 219 F.3d 1138, 1140–41 (9th Cir. 2000), *rev'd*, 534 U.S. 112 (2001).

investigating crimes.”³⁷ Not surprisingly, therefore, the Solicitor General’s Office focused on the consent search exception to the warrant requirement in briefing and arguing the case.³⁸ But the Court expressly declined to decide whether Knights’s signature on the probation order setting out the search condition constituted consent.³⁹

In *Griffin v. Wisconsin*, the Court had previously upheld a probation officer’s search of a home as a permissible administrative inspection,⁴⁰ a search designed to serve some “special need[], beyond the normal need for law enforcement,”⁴¹ and the Solicitor General’s reply brief in *Knights* relied on *Griffin* as an alternative justification for the search of Knights’s home.⁴² But the *Knights* Court did not rely on the warrant exception for administrative inspections either. In fact, the Court acknowledged that *Knights* was “not like” *Griffin*, presumably because the search in *Knights* was conducted by a detective investigating unrelated crimes, acting in the government’s “interest in apprehending violators of the criminal law.”⁴³ As a result, the *Knights* search did not fit within *Griffin*’s rationale that a probation officer’s role in “supervis[ing]” probationers in order to “reduce recidivism” and

37. Petition for Writ of Certiorari at I, *United States v. Knights*, 534 U.S. 112 (2001) (No. 00-1260), 2000 WL 33979551, at *I.

38. See Brief for the United States at 10, *Knights*, 534 U.S. 112 (2001) (No. 00-1260), 2001 WL 799254, at *20; Transcript of Oral Argument at 3–4, *Knights*, 534 U.S. 112 (2001) (No. 00-1260), 2001 WL 1412114, at *4–5; see also Brief of Amicus Curiae State of California in Support of Petitioner at 5, *Knights*, 534 U.S. 112 (2001) (No. 00-1260), 2001 WL 829723, at *6–7.

39. See *Knights*, 534 U.S. at 118.

40. *Griffin v. Wisconsin*, 483 U.S. 868, 870–71 (1987) (permitting a probation officer’s warrantless search of a probationer’s home based on “reasonable grounds” to believe contraband would be found in the home (quoting WIS. ADMIN. CODE HSS §§ 328.21(4), 328.16(1) (1981))).

41. *Id.* at 873 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in the judgment)).

42. See Reply Brief for the United States at 3, *Knights*, 534 U.S. 112 (2001) (No. 00-1260), 2001 WL 1131654, at *3; see also Transcript of Oral Argument, *supra* note 38, at 19–20. Two of the three amicus briefs filed in support of the Government also relied on *Griffin* and the balancing test used to resolve administrative inspection cases. See Brief Amicus Curiae of the Criminal Justice Legal Foundation in Support of Petitioner at 6–7, *Knights*, 534 U.S. 112 (2001) (No. 00-1260), 2001 WL 799253, at *6; Brief of the Center for the Community Interest as Amicus Curiae in Support of Petitioner at 21, *Knights*, 534 U.S. 112 (2001) (No. 00-1260), 2001 WL 799252, at *21; see also Transcript of Oral Argument, *supra* note 38, at 39 (likewise discussing balancing in the context of *Griffin* and the special needs cases).

43. *Knights*, 534 U.S. at 117, 121.

promote “genuine rehabilitation” constituted a special need divorced from ordinary criminal law enforcement.⁴⁴

Instead of analyzing whether the search in *Knights* could be justified by a warrant exception, the Court relied on what Chief Justice Rehnquist called “ordinary Fourth Amendment analysis”—“our general Fourth Amendment approach of ‘examining the totality of the circumstances.’”⁴⁵ “The touchstone of the Fourth Amendment is reasonableness,” the Court asserted, and “the reasonableness of a search is determined ‘by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.’”⁴⁶

On *Knights*’s side of the balance, the Court reasoned that “[p]robation, like incarceration, is a form of criminal sanction” that follows a conviction and *Knights* was “unambiguously informed” of the search condition, thus “significantly” reducing his reasonable expectation of privacy.⁴⁷ On the other side of the scales, without acknowledging that *Knights*’s summary probation for a misdemeanor charge did not even require supervision by a probation officer,⁴⁸ the Court explained that the State had an interest in reducing the high rate of recidivism among probationers.⁴⁹

The Court then concluded that the police needed only reasonable suspicion to search *Knights*’s home because, even though the Fourth Amendment “ordinarily requires” probable cause to search, “a lesser degree” of certainty suffices “when the balance of governmental and

44. *Griffin*, 483 U.S. at 875; see also *Samson v. California*, 547 U.S. 843, 859–60 (2006) (Stevens, J., dissenting) (finding it “no accident” that *Knights* “forwent any reliance on the special needs doctrine” because, unlike “an ordinary law enforcement officer and a probationer unknown to him,” a probation officer plays a “special role” in “supervising the wayward probationer’s reintegration into society” and is “not, or at least not principally, [serving] the general law enforcement goal of detecting crime”).

45. *Knights*, 534 U.S. at 122, 118 (quoting *Ohio v. Robinette*, 519 U.S. 33, 39 (1996)).

46. *Id.* at 118–19 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

47. *Id.* at 119–20 (internal quotation marks omitted) (quoting *Griffin*, 483 U.S. at 874). But see 5 WAYNE R. LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.10(c), at 563–64 (6th ed. 2020) (calling the argument that an expectation of privacy can be reduced by “advance notice of the government’s claimed search authority” “reasoning [that] is totally circular”).

48. See *United States v. Knights*, 219 F.3d 1138, 1140–41 (9th Cir. 2000), *rev’d*, 534 U.S. 112 (2001).

49. See *Knights*, 534 U.S. at 120–21.

private interests makes such a standard reasonable.”⁵⁰ Finally, observing that “general or individual circumstances, including ‘diminished expectations of privacy,’ may justify an exception to the warrant requirement,” the Court held that the same considerations that supported lowering the probable cause requirement likewise made a warrant “unnecessary.”⁵¹

Five years later, in *Samson v. California*, the Court addressed a search condition imposed on a parolee pursuant to a California statute that permitted warrantless searches of parolees without any suspicion whatsoever.⁵² Samson was stopped by a police officer who knew he was on parole and suspected he had an outstanding parole warrant.⁵³ After discovering that no such warrant in fact existed, the officer nonetheless searched Samson “based solely on [his] status as a parolee” and found a baggie of methamphetamine in his pocket.⁵⁴

Quoting *Knights*, Justice Thomas’s opinion for the six Justices in the majority opened its substantive Fourth Amendment discussion by noting that “[u]nder our general Fourth Amendment approach” we “examin[e] the totality of the circumstances” to determine whether a search is reasonable” and then setting out the balancing test articulated in *Knights*.⁵⁵ As in *Knights*, the Court declined to consider whether the search of Samson could be justified under the warrant exceptions for

50. *Id.* at 121 (citing *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Terry v. Ohio*, 392 U.S. 1 (1968)).

51. *Id.* at 121–22 (quoting *Illinois v. McArthur*, 531 U.S. 326, 330 (2001)). For further discussion of *McArthur*’s language, see *infra* notes 159–162 and accompanying text.

52. *Samson v. California*, 547 U.S. 843, 846 (2006).

53. *See id.*

54. *Id.* at 846–47; *see also* *People v. Samson*, 2004 Cal. App. Unpub. LEXIS 9304, at *4 (Cal. Ct. App. Oct. 14, 2004) (reporting that the officer testified that he “conduct[ed] parole searches ‘on a regular basis’ unless he ha[d] ‘other work to do’ or already ‘dealt with’ the parolee” and that he “intended to discharge [Samson] after the parole search ‘if he had nothing on him illegal’” (quoting suppression hearing testimony)), *aff’d*, 547 U.S. 843 (2006).

55. *Samson*, 547 U.S. at 848 (second alteration in original) (internal quotation marks omitted in original) (quoting *Knights*, 534 U.S. at 118). Although the State’s brief likewise focused on the balancing test adopted in *Knights*, *see* Respondent’s Brief on the Merits at 6–10, 13–21, *Samson*, 547 U.S. 843 (2006) (No. 04-9728), 2006 WL 148594, at *6–10, *13–21, the Solicitor General’s Office devoted only the last several pages of its amicus brief to *Knights* and the reasonableness-balancing model. *See* Brief for the United States as Amicus Curiae Supporting Respondent at 27–30, *Samson*, 547 U.S. 843 (2006) (No. 04-9728), 2006 WL 139218, at *27–30.

consent searches⁵⁶ or administrative inspections⁵⁷: “[b]ecause we find that the search at issue here is reasonable under our general Fourth Amendment approach,” the majority explained, “our holding under general Fourth Amendment principles renders such an examination unnecessary.”⁵⁸ Justice Thomas acknowledged that the Court had permitted suspicionless searches only in “limited circumstances, namely, programmatic and special needs searches,” but he responded by observing that the Court had never indicated these were “the only limited circumstances” in which suspicionless searches were constitutional and he concluded that “[t]he touchstone of the Fourth Amendment is reasonableness” rather than “individualized suspicion.”⁵⁹

Applying the reasonableness model to the search at issue in *Samson*, the Court reasoned that parolees have a lesser expectation of privacy than even probationers because “parole is more akin to imprisonment,” and therefore they have “severely diminished expectations of privacy by virtue of their status alone.”⁶⁰ The majority also echoed here the argument made in *Knights* that the search condition was “‘clearly expressed’” to Samson and his “acceptance of a clear and

56. The Court explained that, although a California appellate court had found that prisoners eligible for parole have a choice between remaining in prison and agreeing to the search condition, the California Supreme Court had not “squarely” considered the question and the State might not have preserved the issue below. *Samson*, 547 U.S. at 852–53 n.3. *But cf. id.* at 863 n.4 (Stevens, J., dissenting) (arguing that, even if a prisoner could “choose to remain in prison rather than be released on parole,” prisoners are likewise subjected to “suspicionless searches” and therefore the notion of a parolee consenting to a search condition is a “‘manifest fiction’” (quoting 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.10(b), at 440–41 (4th ed. 2004) (internal quotation marks omitted))); *People v. Reyes*, 968 P.2d 445, 448 (Cal. 1998) (interpreting a prior version of the state statute and rejecting a consent argument on the grounds that “parole is not a matter of choice [because] the prisoner must accept it”).

57. Although the search of Samson, like the search of Knights’s home, seems like ordinary criminal law enforcement, *see supra* notes 40–44 and accompanying text, the bulk of the Solicitor General’s amicus brief in *Samson* relied on *Griffin* and the warrant exception for administrative searches. *See* Brief for the United States as Amicus Curiae Supporting Respondent, *supra* note 55, at 8–27; *see also* Respondent’s Brief on the Merits, *supra* note 55, at 21–31 (raising the special needs jurisprudence as an alternative justification for the search); Antoine McNamara, Note, *The “Special Needs” of Prison, Probation, and Parole*, 82 N.Y.U. L. REV. 209, 243–45 (2007) (likewise endorsing a special needs justification for searches of probationers and parolees).

58. *Samson*, 547 U.S. at 852 n.3.

59. *Id.* at 855 n.4 (also noting that “the object of the Fourth Amendment is reasonableness” (emphasis omitted)).

60. *Id.* at 850, 852.

unambiguous search condition ‘significantly diminished [his] reasonable expectation of privacy.’”⁶¹

On the law enforcement side of the equation, the Court found that the State had a “substantial” interest in reducing the high rate of recidivism among parolees and a regime of suspicionless parolee searches helped address that interest.⁶² Finally, the majority rejected the dissenters’ argument that the California statute gave law enforcement officials “unbridled discretion” to search parolees, noting that the State prohibited “‘arbitrary, capricious or harassing’” parolee searches.⁶³

After *Knights* and *Samson*, the Court “proceed[ed] with business as usual,” applying the warrant-presumption model in Fourth Amendment cases except for those involving “the two P’s—probationers and parolees”—until its 2013 decision in *Maryland v. King*.⁶⁴ *King* involved a Maryland statute that allowed police officers to take a DNA sample “[a]s part of a routine booking procedure” following an arrest for a “serious offense[]” and then to attempt to match the arrestee’s DNA

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61. *Id.* at 852 (quoting *United States v. Knights*, 534 U.S. 112, 119, 120 (2001)); see *supra* note 47 and accompanying text. But see *Samson*, 547 U.S. at 863 (Stevens, J., dissenting) (calling this argument “entirely circular”).
62. *Samson*, 547 U.S. at 853. But see *id.* at 865 (Stevens, J., dissenting) (pointing out that the search condition was imposed on all California parolees, “whatever the nature of their crimes [or] likelihood of recidivism”); Brief for the Petitioner at 28, *Samson*, 547 U.S. 843 (2006) (No. 04-9728), 2005 WL 3785204, at *28 (noting that every state except California and possibly one other was able to address parolee recidivism without allowing law enforcement officials to “engage in suspicionless, nonconsensual searches of parolees”); James M. Binnall, *They Released Me from My Cage . . . But They Still Keep Me Handcuffed: A Parolee’s Reaction to Samson v. California*, 4 OHIO ST. J. CRIM. L. 541, 543–44 (2007) (calling the Court’s reliance on California’s parolee recidivism rate a “flawed tool” because it is not limited to “new crimes parolees commit” but also includes “technical” parole violations, such as drinking alcohol, that “do not harm society and should not factor into the parolee’s place on the continuum of punishment”).
63. *Samson*, 547 U.S. at 856 (quoting *People v. Reyes*, 968 P.2d 445, 450 (Cal. 1998)). But see Transcript of Oral Argument at 24, *Samson*, 547 U.S. 843 (2006) (No. 04-9728), 2006 WL 496216, at *24 (pointing out that the one hundred to two hundred California parolees and probationers who had challenged searches as arbitrary, capricious, or harassing had all been unsuccessful); Maclin, *supra* note 32, at 385 n.141 (questioning the distinction between a suspicionless search and one that is arbitrary and capricious, and arguing that searching *Samson* simply because he was on parole “suggested that the search was arbitrary”).
64. Kaye, *supra* note 25, at 1118. For Supreme Court opinions applying the warrant-presumption model during this time period, see, for example, *Missouri v. McNeely*, 569 U.S. 141, 148–49 (2013), *Kentucky v. King*, 563 U.S. 452, 459 (2011), and *City of Ontario v. Quon*, 560 U.S. 746, 760–61 (2010). For later cases, see *infra* note 274 and accompanying text.

profile to DNA samples collected in unsolved cases.⁶⁵ Following King's arrest on assault charges, a sample of his DNA was taken with a buccal swab, and, four months later, his DNA was found to match that taken from a rape victim six years earlier.⁶⁶

As in *Knights* and *Samson*, Justice Kennedy's majority opinion in this five-to-four decision did not rely on any of the well-established exceptions to the warrant requirement. The Court did refer to the "routine administrative procedure[s] at a police station house incident to booking"⁶⁷ and described as "instructive" *Skinner v. Railway Labor Executives' Association*, which upheld the drug testing of certain railroad employees as a permissible administrative inspection.⁶⁸ But the Court distinguished DNA testing of arrestees from special needs administrative searches, properly acknowledging that *Skinner* involved "a different . . . context" and that "the search here . . . differ[ed] from the sort of programmatic searches . . . the Court ha[d] previously labeled as 'special needs' searches."⁶⁹ After all, as Justice Scalia pointed

65. *Maryland v. King*, 569 U.S. 435, 440 (2013). The state statute was limited to suspects charged with burglary, a "crime of violence," or an attempt to commit one of those crimes. *Id.* at 443 (quoting MD. CODE ANN., PUB. SAFETY § 2-504(a)(3)(i) (LexisNexis 2011)).

66. *See id.* at 441.

67. *Id.* at 449–50 (alteration in original) (quoting *Illinois v. Lafayette*, 462 U.S. 640, 643 (1983) (allowing police to search arrestees' belongings in order to protect their property and ensure they do not injure themselves or others)); *see also id.* at 456 (referring to "reasonable booking searches"); *id.* at 461 (analogizing DNA testing to other "routine 'administrative steps incident to arrest'" (quoting *County of Riverside v. McLaughlin*, 500 U.S. 44, 58 (1991))).

68. *Id.* at 448 (citing *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 622 (1989) (discussing "the standardized nature of the [drug] tests and the minimal discretion vested in those charged with administering the program")).

69. *Id.* at 448, 462 (quoting *Chandler v. Miller*, 520 U.S. 305, 314 (1997)); *see also id.* at 463 ("The special needs cases, though in full accord with the result reached here, do not have a direct bearing on the issues presented in this case, because unlike the search of a citizen who has not been suspected of a wrong, a detainee has a reduced expectation of privacy."). For further discussion of the Court's diminished expectation of privacy distinction, see *infra* note 219 and accompanying text. *But see King*, 569 U.S. at 469–70 n.1 (Scalia, J., dissenting) (calling the Court's efforts to distinguish the special needs cases "perplexing," and wondering why the majority "spill[ed] so much ink on the special need of identification if a special need is not required"); Kaye, *supra* note 33, at 557 (observing that the Court's "balancing incorporated only the state's special (non-crime-solving) interests," and inferring that "the Court implicitly, and awkwardly, created a new special-needs-type exception" for DNA testing). *But see Pretzantzin v. Holder*, 725 F.3d 161, 168 (2d Cir. 2013) (interpreting *King* as applying "the inventory or booking search exception" to the warrant requirement);

out in dissent, the Maryland statute was designed to collect DNA samples “as part of an official investigation into a crime”⁷⁰—or, as he more colorfully put it at oral argument, “to catch the bad guys.”⁷¹

The *King* majority also mentioned the “uncontested” authority to conduct searches incident to arrest,⁷² but had “good reason” for not relying on that warrant exception either.⁷³ Police are permitted to conduct a search at the time of arrest to prevent arrestees from accessing a weapon or destroying evidence.⁷⁴ But King’s DNA was not taken until he was booked,⁷⁵ and DNA testing is not aimed at uncovering weapons or preserving evidence.⁷⁶ Moreover, the Court had

Hawkins v. United States, 113 A.3d 216, 221 (D.C. Cir. 2015) (likewise characterizing *King* as involving a “special needs search”).

- 70. *King*, 569 U.S. at 474 (Scalia, J., dissenting) (quoting MD. CODE ANN., PUB. SAFETY § 2-505(a)(2) (LexisNexis 2011)).
- 71. Transcript of Oral Argument at 61, *King*, 569 U.S. 435 (2013) (No. 12-207), 2006 WL 496216, at *24; *see id.* (the State’s lawyer argued that a “corollary purpose” of the DNA testing was to assist bail determinations, but conceded that “solving crimes” was “the key component”); *see also* Maclin, *supra* note 32, at 382 (noting that “identifying arrestees” is “directly related to law enforcement” and “police are thoroughly involved in conducting and using the results of DNA searches”); Murphy, *supra* note 8, at 177 (observing that the Court made a “tacit concession” that the DNA testing was “ordinary [criminal] law enforcement”). *But see* Brief for the United States as Amicus Curiae Supporting Petitioner at 32 n.12, *King*, 569 U.S. 435 (2013) (No. 12-207), 2013 WL 50686, at *13 n.12 (arguing briefly in favor of the administrative search exception on the grounds that DNA testing “is not targeted at investigating any particular crime,” “a DNA fingerprint standing alone is not incriminating,” and “exoneration of the innocent, supervision of arrestees . . . before trial, and improvement in future public safety” are special needs distinct from ordinary criminal law enforcement (emphasis omitted)); Kaye, *supra* note 33, at 566 (proposing that “[a]uthentication-identification is a special need” because, “[i]f special needs balancing is available for single purpose searches, it also should be available for multipurpose ones” (emphasis omitted)).
- 72. *King*, 569 U.S. at 449.
- 73. *Id.* at 468 (Scalia, J., dissenting).
- 74. *See* *Arizona v. Gant*, 556 U.S. 332, 339–41 (2009); *Chimel v. California*, 395 U.S. 752, 762–63 (1969).
- 75. *See King*, 569 U.S. at 440.
- 76. *See* Transcript of Oral Argument, *supra* note 71, at 26–27 (the Solicitor General’s lawyer acknowledging in response to a question from Justice Kennedy that searches incident to arrest are “bottomed on different justifications than the ones . . . we’re advancing here”); Kaye, *supra* note 33, at 562–63 (noting that, while Justice Kennedy “toyed” at oral argument with the idea of treating DNA collection as a search incident to arrest, his majority opinion “wisely veered away” from that argument because DNA testing does not serve the interests underlying that warrant exception).

suggested in *Schmerber v. California* that searches incident to arrest may not “involv[e] intrusions beyond the body’s surface.”⁷⁷

Instead of relying on a warrant exception, the *King* majority quoted *Samson* and announced—with no explanation—that this case “falls within the category of cases this Court has analyzed by reference to the proposition that the ‘touchstone of the Fourth Amendment is reasonableness, not individualized suspicion.’”⁷⁸ “As the text of the Fourth Amendment indicates,” the Court explained, “the ultimate measure of the constitutionality of a governmental search is reasonableness.”⁷⁹ “[A]pplication of ‘traditional standards of reasonableness,’” Justice Kennedy continued, means that, even when a warrant is not required, a court must balance the competing government and individual interests “to determine if the intrusion was reasonable” “rather than employing a *per se* rule of unreasonableness.”⁸⁰

Examining first the Government’s side of the scales, the Court found that the Maryland statute served the “legitimate” interest in affording the police “a safe and accurate way to process and identify” those “they must take into custody.”⁸¹ Interestingly, the Court did not

77. *Schmerber v. California*, 384 U.S. 757, 769 (1966); *see also* Maclin, *supra* note 32, at 376 (concluding that *Schmerber* “expressly foreclosed” searches incident to arrest “into the bodies of arrestees”).

78. *King*, 569 U.S. at 448 (quoting *Samson v. California*, 547 U.S. 843, 855 n.4 (2006)). Interestingly, Justice Scalia’s dissent asserted, conveniently ignoring *Samson*, that “[i]t is only when a governmental purpose aside from crime-solving is at stake that we engage in the free-form ‘reasonableness’ inquiry that the Court indulges at length today.” *Id.* at 468 (Scalia, J., dissenting); *see also id.* at 466 (“Whenever this Court has allowed a suspicionless search, it has insisted upon a justifying motive apart from the investigation of crime.”). *But cf.* Reply Brief of Petitioner at 3, *King*, 569 U.S. 435 (2013) (No. 12-207), 2013 WL 620877, at *5 (acknowledging that *Samson* “appl[ie]d a balancing test in the field of criminal law enforcement”).

79. *King*, 569 U.S. at 447 (internal quotation marks omitted) (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995)).

80. *Id.* at 448 (first quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999); and then quoting *Illinois v. McArthur*, 531 U.S. 326, 331 (2001)) (noting that even searches authorized by a warrant exception are “not beyond Fourth Amendment scrutiny” and must be “reasonable in . . . scope and manner of execution”). For lower court opinions reading this language to require prosecutors to satisfy both the warrant-presumption model and the reasonableness-balancing model, *see infra* notes 334–343 and accompanying text.

81. *King*, 569 U.S. at 449. The Court went on to explain that law enforcement officials need to be able to ascertain whether an arrestee has assumed a fake identity or is a “devious and dangerous criminal[]” so that they know whether and where to detain the arrestee in order to protect the safety of prison staff and others, to ensure the arrestee does not flee or pose a danger to the community if released on bail, and to serve “the salutary effect of

cite *Samson* in this discussion (and never cited *Knights*), and it did not mention the law enforcement interest in solving cold cases.⁸² Instead, analogizing to other methods of identification, such as photographs and fingerprints, the Court described DNA as “a markedly more accurate form of identifying arrestees.”⁸³

Turning to the defendant’s privacy interests, the majority ignored the fact that it could not rely on the twin rationales of *Knights* and *Samson*: King had not accepted “a clear and unambiguous search condition,” and his arrest did not put him on a “‘continuum’ of state-imposed punishments.”⁸⁴ Nevertheless, the Court explained that the reasonableness of an expectation of privacy “may depend upon the individual’s legal relationship with the State” and arrestees have a reduced expectation of privacy because they may be subjected to other

freeing a person wrongfully imprisoned for the same offense.” *Id.* at 450, 455. *But see id.* at 473–74 (Scalia, J., dissenting) (arguing that “this search had nothing to do with identification” because King’s DNA profile was not added to Maryland’s DNA database until after the bail determination had been made, was not sent to the FBI’s national DNA database until four months after his arrest, and was then compared to the DNA collected from unsolved crime scenes rather than DNA taken from “known convicts or arrestees”; concluding, therefore, that, “if anything was ‘identified’ . . . , it was not King” (whose “identity was already known”) but a “previously-taken [DNA] sample from [an] earlier [unsolved] crime” (emphasis omitted)); *State v. Medina*, 102 A.3d 661, 682 n.21 (Vt. 2014) (questioning the exoneration justification on the grounds that innocent defendants can voluntarily submit their DNA); 3 LAFAVE, *supra* note 47, § 5.4(c), at 298 (describing the Court’s “general ‘identification’ purpose” argument as “bogus”); David H. Kaye, *Two Fallacies About DNA Data Banks for Law Enforcement*, 67 BROOK. L. REV. 176, 203 (2001) (calling the identification rationale for DNA testing “extremely implausible,” and pointing out that “[t]he legislative interest in DNA databases . . . has always been to generate investigative leads”).

82. *See* 3 LAFAVE, *supra* note 47, § 5.4(c), at 301 (charging that the *King* majority “never assessed the . . . case in light of” *Samson*, “the one and only suspicion-less-search/no-special-needs/balancing-of-interests precedent”).
83. *King*, 569 U.S. at 459. *But see id.* at 476, 478 (Scalia, J., dissenting) (calling these comparisons “inapposite” because photographs are not searches within the meaning of the Fourth Amendment and, even if fingerprinting constitutes a search, the results are available in less than an hour and thus fingerprints are “taken primarily to identify” arrestees rather than “to solve crimes”).
84. *Samson v. California*, 547 U.S. 843, 852, 850 (2006) (quoting *United States v. Knights*, 534 U.S. 112, 119 (2001)); *cf.* Transcript of Oral Argument, *supra* note 71, at 11 (Justice Sotomayor asking why arrest triggers the same “assumption” underlying *Samson* and *Knights*—that probationers and parolees are “out in the world” only because of “the largesse of the State” and therefore their homes are equally subject to searches as their cells would be).

searches, such as searches incident to arrest.⁸⁵ The Court also characterized a buccal cheek swab as a “brief” and “minimal intrusion” because it “does not break the skin,” “involves virtually no risk, trauma, or pain,” and “does not increase the indignity already attendant to normal incidents of arrest.”⁸⁶ The analysis of King’s DNA did not constitute “a significant invasion of privacy” either, the Court continued, because the parts of his DNA that were used only disclosed, and were tested for, information about identification and not “genetic traits,”⁸⁷ and the Maryland legislation included “statutory protections that guard[ed] against further invasion of privacy.”⁸⁸ Although the

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85. *King*, 569 U.S. at 462 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995)). *But see* Maclin, *supra* note 32, at 363 (arguing that “it will be difficult to cabin the Court’s logic” because this “reasoning can be used to support” DNA testing of anyone arrested or even stopped for any minor or traffic offense as well as those “who possess diminished privacy interests vis-à-vis the government (such as public school students, driver’s license applicants, and lawyers)”; Murphy, *supra* note 8, at 174–75 (noting that the Court “could have walled off the opinion as a categorical exception that applies only to convicted offenders and arrestees,” but, by “equating DNA sampling with fingerprinting,” *King* “effectively suggest[ed] that anywhere a fingerprint is permissible, a DNA test might be too”).
86. *King*, 569 U.S. at 463–64 (quoting *Schmerber v. California*, 384 U.S. 757, 771 (1996)); *cf.* James W. Hazel & Christopher Slobogin, “A World of Difference”? *Law Enforcement, Genetic Data, and the Fourth Amendment*, 70 DUKE L.J. 705, 746–47 (2021) (presenting results of survey data, which found that collecting arrestees’ DNA was seen as less invasive than a frisk, and reporting that fewer than half of the survey participants thought such testing violated a reasonable expectation of privacy).
87. *King*, 569 U.S. at 464–65. *But see* Brief for the Respondent at 46–47, *King*, 569 U.S. 435 (2013) (No. 12-207), 2013 WL 315233, at *23–24 (arguing that “scientific advances may allow additional personal information to be gleaned from [DNA] data,” and pointing out that the Maryland statute allows the State to “include additional genetic information in an arrestee’s ‘DNA record’” that “‘directly relate[s] to the identification of individuals’” and also to “retain an individual’s DNA sample even after a DNA profile has been prepared” (quoting MD. CODE ANN., PUB. SAFETY § 2-505(b)(1) (Lexis-Nexis 2011))); Murphy, *supra* note 8, at 180 (predicting that if a “pedophile gene” or “violence gene” is found, “then surely law enforcement will seek to mine genetic information for that ‘identification purpose’” given the Court’s rationale that “law enforcement needs to know just whom it is dealing with”). *But see King*, 569 U.S. at 464–65 (admonishing that testing DNA to ascertain “an arrestee’s predisposition for a particular disease or other hereditary factors not relevant to identity . . . would present additional privacy concerns not present here”). For discussion of a subsequent Supreme Court opinion that described this aspect of the Maryland statute somewhat differently, see *infra* note 289.
88. *King*, 569 U.S. at 465. Earlier in the opinion, the Court had observed that the Maryland statute was restricted to arrests for a limited number of “serious crimes,” did not allow an arrestee’s DNA to be “processed or placed

Court did not discuss limits on discretion in weighing the intrusiveness of the search, earlier Justice Kennedy had noted that the Maryland statute required a DNA sample following all arrests for certain “serious crimes” and therefore “DNA collection [was] not subject to the judgment” of individual police officers.⁸⁹

in a database” until after a judicial determination of probable cause at arraignment, and required that DNA samples be destroyed if, for example, the arrestee was acquitted or pardoned. *Id.* at 443. Compare *id.* at 461, 463, 465 (noting that “the necessary predicate of a valid arrest for a serious offense” was “fundamental” to the weight given to the defendant’s expectation of privacy and that that expectation is reduced after an arrest “for a dangerous offense that may require detention before trial,” and concluding that DNA testing is constitutional “[w]hen officers make an arrest supported by probable cause . . . for a serious offense”), and *id.* at 465 (admonishing that “[t]he Court need not speculate about the risks posed ‘by a system that did not contain comparable security provisions’” (quoting *Whalen v. Roe*, 429 U.S. 589, 606 (1977))), with *id.* at 445–46 (acknowledging that other states’ DNA statutes “vary in their particulars” and therefore “this case implicates more than the specific Maryland law”). But see *id.* at 481 (Scalia, J., dissenting) (finding it difficult to “imagine what principle could possibly justify” restricting the majority’s holding to serious crimes, and concluding that “an entirely predictable consequence” of *King* is to allow DNA collection from anyone who is “ever arrested, rightly or wrongly, and for whatever reason”); 3 LAFAYETTE, *supra* note 47, § 5.4(c), at 302 (observing that the statutory limitations were not “explicitly encompassed within the Court’s holding”). For illustrations of lower court opinions evaluating more expansive statutes in the wake of *King*, see, for example, *Haskell v. Harris*, 745 F.3d 1269, 1271 (9th Cir. 2014) (en banc) (per curiam) (finding, in a brief per curiam opinion, that the broader California statute, which collects DNA following any felony arrest, was “clearly” constitutional after *King*), and *People v. Buza*, 413 P.3d 1132, 1142, 1145, 1146 (Cal. 2018) (noting, without resolving the issue in the context of the California statute, that “as a matter of ordinary usage, a felony is considered a ‘serious’ offense,” that “given the basic logic of *King*, we cannot say” that analyzing DNA following an arrest without waiting for the arraignment “undermines the reasonableness of the search,” and that *King* “mentioned Maryland’s automatic destruction provisions in passing, [but] attached no significance to them in its constitutional analysis”). But see *State v. Villarreal*, 475 S.W.3d 784, 809 (Tex. Crim. App. 2014) (distinguishing *King* on the grounds that the Court “took into consideration” the Maryland statute’s limitations).

89. *King*, 569 U.S. at 447–48. But see Brief for the Respondent, *supra* note 87, at 43 (pointing out that “police will often have considerable latitude to charge defendants with offenses that qualify for DNA collection,” and noting that *King* was originally charged with both first- and second-degree assault (although the first-degree charge was later dropped) and the police could not have collected his DNA had he been charged with only second-degree assault); Murphy, *supra* note 8, at 189, 190 (arguing that “[t]he notion that arrestee testing invites no law enforcement discretion makes sense only if one believes that the police lack discretion in making decisions about arrest,” and positing that “it surely does not strain the imagination to consider that police may begin selecting charges with one eye on the DNA

With *King*, the trilogy was complete. The next Part of the Article explores the roots of the reasonableness-balancing approach featured in *Knight*s, *Samson*, and *King* with an eye towards examining whether the Court had any precedential support for that model or whether the three cases changed the face of Fourth Amendment jurisprudence.

II. THE ORIGINS OF THE REASONABLENESS-BALANCING MODEL

As noted above,⁹⁰ some academics reject the position advocated in the previous discussion; rather than viewing the reasonableness-balancing model as originating in 2001 with *Knight*s, they trace it back to the 1960s, to the Supreme Court decisions endorsing warrant exceptions for administrative inspections and stops and frisks in *Camara v. Municipal Court*⁹¹ and *Terry v. Ohio*.⁹² In a similar vein, *Knight*s, *Samson*, and *King* include repeated assertions suggesting that the reasonableness-balancing model is the Court's "general,"⁹³ "ordinary,"⁹⁴ and "traditional"⁹⁵ approach to Fourth Amendment jurisprudence. In fact, however, the Court's precedents, at least in the previous fifty years, consistently adhered to the warrant-presumption model.⁹⁶ Unsurprisingly, then, the Justices were able to offer very little in the way of support for using a freewheeling balancing test to analyze the constitutionality of a particular search, and the balancing approach that appears in the trilogy of reasonableness-balancing model cases differs markedly from the weighing the Court previously did within the framework of the warrant-presumption model in opinions like *Camara* and *Terry*.

After examining the balancing analysis conducted in the Supreme Court's Fourth Amendment case law before *Knight*s, *Samson*, and *King*, this Part of the Article goes on to discuss the precedent cited in

collection statute"). *But see* United States v. Bain, 874 F.3d 1, 17 (1st Cir. 2017) (citing *King* as illustrating the principle that, when the Court uses the balancing model, it "replace[s] the warrant requirement . . . with a limitation on the discretion of officers conducting the searches"); *Villarreal*, 475 S.W.3d at 810 (distinguishing *King* on the grounds that the police exercised "no discretion" in enforcing the Maryland statute).

90. See *supra* notes 30–32 and accompanying text.

91. *Camara v. Mun. Ct.*, 387 U.S. 523, 537–39 (1967).

92. *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968).

93. *Samson v. California*, 547 U.S. 843, 848, 852 n.3 (2006); *United States v. Knight*s, 534 U.S. 112, 118 (2001).

94. *Knight*s, 534 U.S. at 122.

95. *Maryland v. King*, 569 U.S. 435, 448 (2013) (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

96. See *supra* note 16 and accompanying text.

those three decisions, other possible sources of support for the reasonableness-balancing model, and finally Supreme Court rulings that undermine the balancing approach. Although general language evoking an ad hoc balancing approach can be found in a few Supreme Court opinions, they rely exclusively on warrant-presumption model decisions or they do not depart substantially from that model. Therefore, this Part ultimately rejects the view that *Knights* broke no new ground in deciding to use a balancing approach to determine the constitutionality of the search at issue there.

A. Balancing Before Knights

To be sure, the Court did rely on balancing tests in deciding what constitutional rules govern law enforcement officials prior to 2001. Thus, under the warrant-presumption model, the Court resorted to a balancing approach in ruling on the creation and scope of categorical exceptions to the warrant and probable cause requirements.

In the landmark decision in *Terry*, for example, Chief Justice Warren's opinion engaged in an extensive analysis of the competing law enforcement and privacy interests before deciding to endorse the stop-and-frisk exception.⁹⁷ Admonishing that "the central inquiry under the Fourth Amendment" is "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security," the Court quoted from *Camara* in observing that, "[i]n order to assess the reasonableness of Officer McFadden's conduct as a general proposition, . . . there is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.'"⁹⁸ The result of that balancing process was to allow law enforcement officials to make a warrantless stop and frisk based on reasonable suspicion.⁹⁹ But, once

97. *See Terry*, 392 U.S. at 10–15.

98. *Id.* at 19, 20–21 (second and third alterations in original) (quoting *Camara v. Mun. Ct.*, 387 U.S. 523, 536–37 (1967)); *see id.* at 20 (noting that "the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures" (citing Richard M. Leagre, *The Fourth Amendment and the Law of Arrest*, 54 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 393, 396–403 (1963) (surveying the Fourth Amendment's constitutional history and the Supreme Court's search-incident-to-arrest opinions discussed *supra* note 15, and arguing that the Fourth Amendment mandates both that an exception is required for a warrantless search and additionally that all searches must be performed reasonably under all the circumstances))).

99. *See id.* at 30–31. For additional opinions in the *Terry* line of cases using a balancing approach to determine the permissible scope of stops and frisks, see, for example, *United States v. Hensley*, 469 U.S. 221, 227–29 (1985) (applying a balancing test in permitting *Terry* stops to investigate previous unsolved felonies), and *United States v. Place*, 462 U.S. 696, 706 (1983)

the Court weighed the competing interests in *Terry*, the constitutionality of subsequent stops and frisks turned on whether the police had reasonable suspicion and stayed within the limited confines of the intrusion allowed by *Terry*, and not on which party won the balancing test on the facts of the particular case.¹⁰⁰

The Court has similarly adopted a balancing approach in deciding when to allow other seizures on a standard of proof lower than probable cause. In *Michigan v. Summers*, the Court relied on *Terry* and considered the competing governmental and individual interests in evaluating the constitutionality of the warrantless seizure involved in requiring residents to “re-enter” and “remain” in their home while police execute a search warrant.¹⁰¹ Invoking the Fourth Amendment’s “ultimate standard of reasonableness,” the Court considered “the character of the official intrusion and its justification” in deciding that such detentions were permissible.¹⁰² But *Summers*, the Court later emphasized, articulated a “categorical” rule that did not turn on either “the ‘quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure.’”¹⁰³

When the Court in *Bailey v. United States* subsequently refused to expand “the rule in *Summers*” “beyond the immediate vicinity of the premises to be searched,”¹⁰⁴ Justice Scalia’s concurring opinion, joined by Justices Ginsburg and Kagan, emphasized that the “interest-balancing approach” taken by the lower court and advocated by the dissent was “incompatible with” *Summers*’s “categorical rule.”¹⁰⁵ It was the dissenters who quoted the “touchstone” language¹⁰⁶ in advancing the lower court’s view that law enforcement officials executing a search

(relying on a balancing test in concluding that “the principles of *Terry* and its progeny” allow the brief detention of luggage based on reasonable suspicion).

100. See, e.g., *Rodriguez v. United States*, 575 U.S. 348, 354–57 (2015) (holding that a traffic stop lasted longer than authorized by *Terry*); *United States v. Cortez*, 449 U.S. 411, 418–19 (1981) (finding that reasonable suspicion to stop a vehicle existed on the facts there).

101. *Michigan v. Summers*, 452 U.S. 692, 705 (1981).

102. *Id.* at 699, 701.

103. *Muehler v. Mena*, 544 U.S. 93, 98 (2005) (quoting *Summers*, 452 U.S. at 705 n.19); see also *Bailey v. United States*, 568 U.S. 186, 193 (2013) (describing *Summers* as “defin[ing] an important category of cases in which detention is allowed without probable cause to arrest”).

104. *Bailey*, 568 U.S. at 201.

105. *Id.* at 203 (Scalia, J., concurring).

106. *Id.* at 211 (Breyer, J., dissenting) (quoting *Kentucky v. King*, 563 U.S. 452, 459 (2011)).

warrant should be allowed to detain individuals they see leaving a residence so long as they act “as soon as reasonably practicable.”¹⁰⁷ Although “[t]he existence and scope of the *Summers* exception” turned on a balancing of the competing interests, Justice Scalia responded, the “categorical, bright-line rule” that emerged from that balancing process did not allow for “open-ended balancing . . . [w]eighing the equities” “in an individual case.”¹⁰⁸ Using a balancing test to create “a narrow, categorical exception” to the Fourth Amendment’s warrant requirement, Justice Scalia pointed out, is very different from the “open-ended ‘reasonableness’ inquiry” the lower court used to conclude that the police acted reasonably under the circumstances of that case.¹⁰⁹

The Court has likewise used a balancing test in articulating the “constitutional standard[s]” that govern not just “when” but also “how” a warrantless seizure may be made.¹¹⁰ In *Graham v. Connor*, for example, the Court balanced the competing individual and law enforcement interests in holding that “the question” to be asked in evaluating Fourth Amendment excessive force cases is “whether the officers’ actions [were] ‘objectively reasonable’ in light of the facts and circumstances confronting them” as “judged from the perspective of a reasonable officer on the scene.”¹¹¹ But the Court’s reliance on a balancing test in creating this “settled and exclusive framework” for analyzing excessive force claims is very different from rebalancing the competing interests on the facts of each case.¹¹² And the Court’s instruction that “the totality of the circumstances” must be considered in deciding whether a particular use of force was objectively reasonable is also distinguishable from an ad hoc balancing test that is constantly reapplied in every case.¹¹³ A significant number of Fourth Amendment issues turn on a totality-of-the-circumstances analysis but do not involve any sort of balancing process.¹¹⁴

107. *Id.* at 207 (emphasis omitted) (quoting *United States v. Bailey*, 652 F.3d 197, 208 (2d Cir. 2011), *rev’d*, 568 U.S. 186 (2013)).

108. *Id.* at 203–04 (Scalia, J., concurring) (emphasis omitted).

109. *Id.* at 205.

110. *Graham v. Connor*, 490 U.S. 386, 388, 395 (1989) (emphasis omitted).

111. *Id.* at 397, 396; *see also* *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (likewise applying a balancing test in articulating the limits on the use of deadly force to apprehend a fleeing felon).

112. *County of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1546 (2017).

113. *Graham*, 490 U.S. at 396 (quoting *Garner*, 471 U.S. at 9).

114. *See, e.g.*, *United States v. Drayton*, 536 U.S. 194, 201–02 (2002) (noting that the “proper inquiry” in deciding whether “a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter”—and thus whether a Fourth Amendment “seizure” has occurred—“necessitates a

Admittedly, the Court has required that a balancing test be conducted in assessing the constitutionality of one specific category of warrantless searches: administrative inspections, that is, searches designed to serve some “special need[], beyond the normal need for law enforcement.”¹¹⁵ In fact, as explained above,¹¹⁶ the balancing test applied in *Terry* was borrowed from the Court’s first opinion to uphold the constitutionality of an “administrative inspection program[],” *Camara v. Municipal Court*.¹¹⁷ But, with the exception of the special needs cases, once the Court has balanced the competing interests and created a new warrant exception, subsequent searches are evaluated by determining whether the prerequisites for that warrant exception are satisfied rather than by continuously rebalancing the relevant interests based on the facts of each case.¹¹⁸

consideration of ‘all the circumstances surrounding the encounter’” (quoting *Florida v. Bostick*, 501 U.S. 429, 436, 439 (1991)); *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (requiring that judges use a “totality-of-the-circumstances analysis” in assessing whether a search is supported by probable cause); *United States v. Cortez*, 449 U.S. 411, 417 (1981) (instructing that “the totality of the circumstances—the whole picture—must be taken into account” in determining reasonable suspicion); *Schneekloth v. Bustamonte*, 412 U.S. 218, 227 (1973) (adopting a totality-of-the-circumstances test to measure the voluntariness of consent).

115. *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in the judgment)). For criticism of the Court’s distinction between special needs and criminal law enforcement, see, for example, Thomas K. Clancy, *The Fourth Amendment’s Concept of Reasonableness*, 2004 UTAH L. REV. 977, 1025 (calling the distinction “illusory” and “unwise”), and Stephen J. Schulhofer, *On the Fourth Amendment Rights of the Law-Abiding Public*, 1989 SUP. CT. REV. 87, 89 (referring to the distinction as “chimerical and irrelevant”). *But cf.* Scott E. Sundby, *Protecting the Citizen “Whilst He Is Quiet”: Suspicionless Searches, “Special Needs” and General Warrants*, 74 MISS. L.J. 501, 551 (2004) (linking the Court’s decision to take on a “judicial oversight” “role as an active ‘policy magistrate’” in these cases to “the concerns over general warrants that gave rise to the Fourth Amendment”).
116. See *supra* note 98 and accompanying text.
117. *Camara v. Mun. Ct.*, 387 U.S. 523, 525 (1967). For other opinions documenting the Court’s use of a balancing test to evaluate the constitutionality of special needs searches, see, for example, *Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001), *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444, 449–50, 455 (1990), *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 619–20 (1989), and *Bell v. Wolfish*, 441 U.S. 520, 559–60 (1979).
118. The Court has also applied a balancing test in deciding when an exclusionary remedy is available, weighing the deterrent benefits of suppressing the evidence against the costs imposed by the exclusionary rule. See, e.g., *Hudson v. Michigan*, 547 U.S. 586, 594–99 (2006) (refusing to apply the exclusionary rule to violations of the knock-and-announce requirement); *United States v. Leon*, 468 U.S. 897, 913 (1984) (creating the good-faith exception to the

The distinction between the uncabined reasonableness-balancing model and the limited use of a balancing test in administrative inspection cases is reinforced by the relationship between the rationales in *Knights* and *Griffin v. Wisconsin*. In refusing to be constrained by *Griffin*'s special needs analysis, the *Knights* Court described as "dubious logic" the view that *Griffin*'s decision allowing "a particular search" impliedly prohibited "any search that [was] not like it."¹¹⁹ That reasoning, the Court continued, was rebutted by *Griffin*'s "express statement" that its special needs analysis made it unnecessary to assess whether probationer searches were "otherwise reasonable within the meaning of the Fourth Amendment."¹²⁰

But in *Griffin*, the state supreme court had recognized a new exception to the warrant requirement, "a probationer exception," which that court justified on the grounds that "probation places limitations on the liberty and privacy rights of probationers."¹²¹ When the case reached the Supreme Court, Justice Scalia's majority opinion preferred not to "embrace a new principle of law," as he thought the Wisconsin court "evidently did," but instead to resolve the case based on "well-established principles" and therefore to use the special needs rubric to uphold the probation officer's search of Griffin's home.¹²² By the time *Knights* came along, however, the Court did not have similar qualms about breaking new ground and relying on reasoning similar to the Wisconsin Supreme Court's to justify using a balancing test to evaluate the constitutionality of the investigative search of *Knights*'s home.

The freewheeling balancing analysis introduced in *Knights* differed, therefore, from the Court's prior, limited use of a balancing approach: in ruling on the creation and scope of categorical exceptions to the warrant requirement and in evaluating the constitutionality of administrative inspections. The next Section goes on to analyze the precedent the Court offered in *Knights*, *Samson*, and *King* to support the balancing done in those cases.

exclusionary rule). For criticism of the Court's use of "two tiers of reasonableness review" in evaluating "both the substance of the [Fourth Amendment] right and the availability of a remedy" under these "overlapping, but distinct, reasonableness tests," see Kamin & Marceau, *supra* note 5, at 590.

119. *United States v. Knights*, 534 U.S. 112, 117 (2001).

120. *Id.* at 117–18 (citing *Griffin*, 483 U.S. at 876, 880).

121. *State v. Griffin*, 388 N.W.2d 535, 541, 536 (Wis. 1986) (allowing probation officers to search a probationer's home without a warrant based on "reasonable grounds" to believe that a probationer has contraband"), *aff'd on other grounds*, 438 U.S. 868 (1987).

122. *Griffin*, 483 U.S. at 872–73.

B. The Precedent Cited by the Trilogy

Although the balancing test featured in the Court's three reasonableness-balancing model decisions differs from the balancing the Justices had previously done under the warrant-presumption model, the three opinions are not completely citationless. Nevertheless, aside from some general language supporting a balancing approach that appears in a few Supreme Court opinions, none of the case law cited by the Court departed substantially from the warrant-presumption model and the type of balancing described in the prior Section.

In *Knights*, the Court relied on two precedents to support the balancing approach: the statement in *Ohio v. Robinette* that reasonableness inquiries require a totality-of-the-circumstances analysis,¹²³ and the balancing test articulated in *Wyoming v. Houghton*.¹²⁴ But these cases cannot do the work the *Knights* Court asked of them.

Ohio v. Robinette struck down a "bright-line" "*per se* rule" providing that consent to a search that was allegedly given after a lawful stop ended could not be considered voluntary unless the suspect had been informed she was free to leave.¹²⁵ The *Robinette* majority did comment that "[r]easonableness" for Fourth Amendment purposes is "measured in objective terms" by looking at the totality of the circumstances, but the Court's focus there was on its purportedly "traditional" approach of "eschew[ing] bright-line rules" in Fourth Amendment cases.¹²⁶ Although it has become something of a sport among criminal procedure scholars to point out how inconsistent the Court's Fourth Amendment decisions have been on the subject of bright-line rules,¹²⁷ the issue in *Robinette* turned on the voluntariness of consent, and the Court rightly observed that it had consistently treated the voluntariness of a suspect's consent as "a question of fact to be determined from all the circumstances."¹²⁸ But examining the totality of the circumstances in analyzing one of the issues relevant in applying one of the categorical exceptions to the warrant requirement is very

123. See *Knights*, 534 U.S. at 118 (citing *Ohio v. Robinette*, 519 U.S. 33, 39 (1996)).

124. See *id.* at 118–19 (citing *Wyoming v. Houghton*, 526 U.S. 295, 299–300 (1999)); see also *Maryland v. King*, 569 U.S. 435, 448 (2019) (similarly relying on *Houghton*).

125. *Robinette*, 519 U.S. at 36.

126. *Id.* at 39 (quoting *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988)).

127. See, e.g., Kit Kinports, *Criminal Procedure in Perspective*, 98 J. CRIM. L. & CRIMINOLOGY 71, 126 & n.267 (2007) (discussing scholarly treatment of this issue).

128. *Robinette*, 519 U.S. at 40 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 248–49 (1973)).

different from letting the ad hoc balancing test articulated in *Knights* dictate the constitutionality of a search.¹²⁹

Wyoming v. Houghton involved another exception to the warrant requirement—the automobile exception. In holding that the probable cause needed to justify the warrantless search of a vehicle authorized the police to search the belongings of a passenger,¹³⁰ Justice Scalia’s majority opinion in *Houghton* did set out his preferred originalist approach to Fourth Amendment issues: to ask first whether the search would have been permitted under the framing-era common law; and, if that question had “no answer,” to then assess the constitutionality of the search “under traditional standards of reasonableness” by using a balancing test.¹³¹ Admittedly, the other Justices in the majority went along with this language, with only Justice Breyer’s concurring opinion adding the caveat that “history is meant to inform, but not automatically to determine,” Fourth Amendment analysis.¹³² But the three dissenters objected that “[n]either the precedent cited by the Court, nor the majority’s opinion in this case, mandate that [two-step] approach.”¹³³ In fact, the only support Justice Scalia cited for the

129. See *supra* notes 113–114 and accompanying text.

130. See *Wyoming v. Houghton*, 526 U.S. 295, 302 (1999).

131. *Id.* at 299–300; see also *id.* at 303 (“Even if the historical evidence . . . were thought to be equivocal, we would find that the balancing of the relative interests weighs decidedly in favor of allowing searches of a passenger’s belongings.”). For another illustration of Justice Scalia’s two-pronged approach to Fourth Amendment questions, see *Virginia v. Moore*, 553 U.S. 164, 168, 171 (2008).

132. *Houghton*, 526 U.S. at 307 (Breyer, J., concurring).

133. *Id.* at 311 n.3 (Stevens, J., dissenting); see *Tennessee v. Garner*, 471 U.S. 1, 13 (1985) (reasoning that, given the “sweeping change in the legal and technological context,” applying the common-law rule there would lead to “a mistaken literalism that ignores the purposes of a historical inquiry”); *Payton v. New York*, 445 U.S. 573, 591 & n.33 (1980) (explaining that the common law is “obviously relevant” but not “entirely dispositive” of what the Framers viewed as reasonable, and that the Justices had “not simply frozen into constitutional law” the prevailing law enforcement policies of the framing era); see also Friedman & Stein, *supra* note 24, at 296 (characterizing *Houghton* as “a new approach to the Fourth Amendment”); David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1760 (2000) (describing *Houghton* as “embrac[ing]” “new Fourth Amendment originalism”). For discussion of a subsequent Supreme Court opinion rejecting an approach similar to that outlined in *Houghton*, see *infra* notes 259–265 and accompanying text. For criticism of the Court’s reliance on common law in some of its Fourth Amendment case law, see, for example, Thomas Y. Davies, *Can You Handle the Truth? The Framers Preserved Common-Law Criminal Arrest and Search Rules in “Due Process of Law”—“Fourth Amendment Reasonableness” Is Only a Modern, Destructive, Judicial Myth*, 43 TEX. TECH L. REV. 51, 53 (2010) (charging that the Justices have reached

balancing test was an administrative inspection opinion, *Vernonia School District 47J v. Acton*,¹³⁴ which, as discussed below, the Court would likewise rely on later in *Maryland v. King*.¹³⁵

Despite Justice Scalia's reference to a balancing test, his opinion in *Houghton* fits squarely within the warrant-presumption model. The Court was applying its automobile exception precedents, in particular, the decision in *United States v. Ross* allowing police to open containers as part of a vehicle search.¹³⁶ And, in weighing the relevant interests, Justice Scalia relied heavily on the rationales underlying the automobile exception: that vehicles trigger a reduced expectation of privacy,¹³⁷ and their "ready mobility" creates a notion of exigency.¹³⁸ As the dissent suggested, therefore, *Houghton* did not squarely endorse the substantial deviation from the warrant-presumption model adopted in *Knights*.

Five years later, *Knights* did all the heavy lifting in *Samson*. Justice Thomas's majority opinion in *Samson* had to go no further than to cite *Knights* in characterizing the totality-of-the-circumstances balancing test as "our general Fourth Amendment approach."¹³⁹ The only other precedent that *Samson* arguably used to support the reasonableness-

decisions based on "the majority's ideological predilections and then have sometimes advanced or concocted historical claims to justify their decisions"); Donald A. Dripps, *Responding to the Challenges of Contextual Change and Legal Dynamism in Interpreting the Fourth Amendment*, 81 MISS. L.J. 1085, 1131 (2012) (calling the "originalist approach to the Fourth Amendment based on specific founding-era practices . . . illogical and unwise" because "[a] search or seizure in 1791 took place in an institutional context so different from ours that it simply is not the same search or seizure it was then" and because "[t]he founders . . . understood the common law to be dynamic" and "[t]he language they chose was crafted against a background they expected to evolve"); and Sklansky, *supra*, at 1794 (noting that "the Fourth Amendment does not codify eighteenth-century common law, and the available evidence suggests that was not its purpose," and questioning whether the common law is a "secure tether for Fourth Amendment rights" given that, "[m]ore often than not, eighteenth-century 'common law' itself is wildly indeterminate").

134. See *Houghton*, 526 U.S. at 300 (citing *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652–53 (1995)).

135. See *infra* notes 149–155 and accompanying text.

136. See *Houghton*, 526 U.S. at 301 (citing *United States v. Ross*, 456 U.S. 798, 824 (1982)).

137. See *Houghton*, 526 U.S. at 303 (citing *South Dakota v. Opperman*, 428 U.S. 364, 368 (1976); *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974)).

138. *Id.* at 304 (quoting *California v. Carney*, 471 U.S. 386, 390 (1985)).

139. *Samson v. California*, 547 U.S. 843, 848 (2006) (quoting *United States v. Knights*, 534 U.S. 112, 118 (2001)).

balancing model was *United States v. Martinez-Fuerte*.¹⁴⁰ In responding to the dissent's argument that Supreme Court case law did not allow searches justified by neither individualized suspicion nor special needs,¹⁴¹ the *Samson* majority observed that "[t]he touchstone of the Fourth Amendment is reasonableness, not individualized suspicion," and then, quoting *Martinez-Fuerte*, acknowledged that, although the Justices had often held that the "accommodat[ion]" of "public and private interests" required "some quantum of individualized suspicion," they had also said that the Fourth Amendment "imposes no irreducible requirement of such suspicion."¹⁴²

United States v. Martinez-Fuerte involved immigration stops at fixed Border Patrol checkpoints and, like other administrative inspection cases, used a balancing test to evaluate the validity of the checkpoint questioning.¹⁴³ In concluding that reasonable suspicion was not required to justify stopping a vehicle at a permanent immigration checkpoint, the Court relied on other administrative inspection cases, most notably *Camara*, which had allowed special needs searches without individualized suspicion so long as the inspection scheme included some other mechanism for limiting the discretion of the individual inspectors.¹⁴⁴ Thus, even if the *Samson* Court was hoping to rely on *Martinez-Fuerte* for more than the proposition that the Fourth Amendment does not always require individualized suspicion, that precedent did not support resorting to a balancing test outside the administrative inspection context.

In fact, the *Samson* majority seemed to concede this point, acknowledging after quoting *Martinez-Fuerte* that the Justices had "only sanctioned suspicionless searches in limited circumstances, namely,

140. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

141. *See Samson*, 547 U.S. at 860 (Stevens, J., dissenting).

142. *Id.* at 855 n.4 (majority opinion) (quoting *Martinez-Fuerte*, 428 U.S. at 560–61); *see also* *Maryland v. King*, 569 U.S. 435, 447 (2013) (similarly relying on *Martinez-Fuerte*).

143. *Martinez-Fuerte*, 428 U.S. at 554–55. For a discussion of the balancing test used in special needs cases, *see supra* note 117 and accompanying text.

144. *See Martinez-Fuerte*, 428 U.S. at 560–61 (citing *Camara v. Mun. Ct.*, 387 U.S. 523, 538 (1967) (permitting housing inspections based on an area warrant)); *see also id.* at 559 (reasoning that "[r]outine checkpoint stops . . . involve less discretionary enforcement activity"). *See generally* Kit Kinports, *The Quantum of Suspicion Needed for an Exigent Circumstances Search*, 52 U. MICH. J.L. REFORM 615, 640 n.133 (2019) (observing that the Court's special needs opinions have fluctuated between treating discretion minimization as a separate hurdle that administrative inspections must clear and as one of the factors to be considered in applying the balancing test).

programmatic and special needs searches.”¹⁴⁵ Although Justice Thomas went on to say the Court had never held that these were “*the only* limited circumstances” in which suspicionless searches were permissible, the *Samson* Court thereby apparently recognized that *Martinez-Fuerte* and the administrative inspection line of cases were distinguishable and did not endorse the reasonableness-balancing model.¹⁴⁶

Admittedly, the Court seemed to make a greater effort to find precedent for the reasonableness-balancing model in *Maryland v. King*. In addition to mentioning some of the case law relied on in *Knights* and *Samson*,¹⁴⁷ *King* cited four other opinions in support of the balancing approach and “addressed” the case before it with “this background” in mind.¹⁴⁸

King started off with the statement in *Vernonia School District 47J v. Acton* that, “[a]s the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is reasonableness.”¹⁴⁹ *Acton* was a special needs case challenging the drug testing of student athletes.¹⁵⁰ Written by Justice Scalia, the majority opinion in *Acton*, like his later opinion for the Court in *Wyoming v. Houghton*, opened its Fourth Amendment analysis with a description of his preferred approach to Fourth Amendment jurisprudence. After making the uncontroversial point the Court repeated in *King*, that the language of the Fourth Amendment makes reasonableness “the ultimate measure” of the validity of a search,¹⁵¹ the majority opinion in *Acton* continued in much the same vein as *Houghton*: “[a]t least in a case such as this, where there was no clear practice, either approving or disapproving the type of search at issue” when the Fourth Amendment was written, the reasonableness of the search must be evaluated by weighing the competing individual and governmental interests.¹⁵² But

145. *Samson*, 547 U.S. at 855 n.4.

146. *Id.* (emphasis added).

147. See *supra* notes 124 & 142.

148. *Maryland v. King*, 569 U.S. 435, 447 (2013).

149. *Id.* (internal quotation marks omitted) (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995)); see also *id.* at 462 (relying on the *Acton* Court’s comment that the reasonableness of an expectation of privacy “may depend upon the individual’s legal relationship with the State” (quoting *Acton*, 515 U.S. at 654)).

150. See *Acton*, 515 U.S. at 648.

151. *Id.* at 652. For further discussion of this point, see *infra* notes 193–198 and accompanying text.

152. *Acton*, 515 U.S. at 652–53 (emphasis added) (citing *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 619 (1989); *Delaware v. Prouse*, 440 U.S. 648, 654 (1979)).

the two opinions *Acton* cited here to support the balancing test, like *Acton* itself, involved administrative inspections.¹⁵³ And the very next sentence in Justice Scalia's opinion in *Acton* acknowledged the warrant-presumption model, noting that "this Court has said that reasonableness generally requires" a warrant but that exceptions exist in, for example, special needs cases.¹⁵⁴ Given that *Acton* was a special needs case, it is no surprise that the majority opinion went on to balance the competing interests in upholding the school district's drug testing policy.¹⁵⁵ But, as noted above with respect to *Martinez-Fuerte*, *Acton* does not support resorting to a balancing test beyond "a case such as this"—i.e., one that arises in the administrative inspection context.

The majority opinion in *King* turned next to *Illinois v. McArthur*, including two quotations from that decision, which upheld the impoundment of a residence while police sought a search warrant.¹⁵⁶ Like *Acton*, Justice Breyer's majority opinion in *McArthur* began its analysis of the merits of the case by quoting the Fourth Amendment and then stating that "[i]ts 'central requirement' is one of reasonableness."¹⁵⁷ Again like *Acton*, *McArthur* acknowledged the warrant-presumption model, noting that a warrant is required "in 'the ordinary case.'"¹⁵⁸

In the language first quoted in *King*, Justice Breyer then pointed out that, "[w]hen faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable."¹⁵⁹ The citations that followed this statement were all cases adhering to the warrant-presumption model,¹⁶⁰ and the considerations it listed are precisely those the Court

153. See *Skinner*, 489 U.S. at 633–34 (upholding the warrantless drug testing of certain railroad employees as a permissible administrative inspection); *Prouse*, 440 U.S. at 663 (allowing highway safety automobile stops based on reasonable suspicion).

154. *Acton*, 515 U.S. at 653.

155. See *id.* at 654–64.

156. *Illinois v. McArthur*, 531 U.S. 326, 328 (2001).

157. *Id.* at 330 (quoting *Texas v. Brown*, 460 U.S. 730, 739 (1983) (plurality opinion)).

158. *Id.* (quoting *United States v. Place*, 462 U.S. 696, 701 (1983)).

159. *Maryland v. King*, 569 U.S. 435, 447, 463 (2013) (quoting *McArthur*, 531 U.S. at 330); see also *United States v. Knights*, 534 U.S. 112, 121–22 (2001) (quoting some of the same language from *McArthur*).

160. See *McArthur*, 531 U.S. at 330–31 (citing *Pennsylvania v. Labron*, 518 U.S. 938, 940–41 (1996) (per curiam) (automobile exception); *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (administrative search); *Place*, 462 U.S. at 706 (*Terry* seizure of luggage); *Michigan v. Summers*, 452 U.S.

has taken into account in creating categorical exceptions to the warrant requirement.¹⁶¹ It is not obvious what other situations the phrase “or the like” was meant to refer to, or what the Court had in mind in suggesting a distinction between cases where “general” versus “individual” circumstances justify a warrantless intrusion. But this language does not evidence any clear intent to deviate from the warrant-presumption model or to allow law enforcement to proceed without a warrant because of the peculiar facts of a particular case—beyond the situations where they have the requisite suspicion in an “individual” case needed, for example, to frisk a suspect or search a vehicle. Moreover, a recent Supreme Court opinion situated *McArthur* in the warrant-presumption model, pointing out that warrants are “normally required” and then quoting the sentence that preceded *McArthur*’s “or the like” statement for the proposition that “we have also ‘made it clear that there are exceptions to the warrant requirement.’”¹⁶²

The majority opinion in *McArthur* continued by finding that the impoundment of the defendant’s home was not “*per se* unreasonable” “[i]n the circumstances of the case before us.”¹⁶³ Invoking a well-recognized exception to the warrant requirement, the Court found “a plausible claim of . . . ‘exigent circumstances.’”¹⁶⁴ After citing some of its exigent circumstances precedents and noting that the impoundment of *McArthur*’s residence was “tailored to that need,” the Court, in the second sentence quoted in *King*, mentioned the balancing test: “[c]onsequently, rather than employing a *per se* rule of unreasonableness, we

692, 702–05 (1981) (detention during execution of search warrant); *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (stop and frisk)).

161. *See, e.g.*, *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000) (tying the warrant exception for administrative searches to special needs); *California v. Carney*, 471 U.S. 386, 391–92 (1985) (noting that the automobile exception is premised in part on the reduced expectation of privacy surrounding vehicles); *Terry*, 392 U.S. at 25–26 (reasoning that a stop and frisk is less intrusive than an arrest and full search in justifying the stop-and-frisk exception).

162. *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2534 (2019) (plurality opinion) (quoting *McArthur*, 531 U.S. at 330); *see also Akinmboni v. United States*, 126 A.3d 694, 697 (D.C. 2015) (similarly aligning *McArthur* with the warrant-presumption model). *But see State v. Ryce*, 368 P.3d 342, 375 (Kan. 2016) (interpreting *McArthur*’s language as illustrating “general reasonableness”); *State v. Villarreal*, 475 S.W.3d 784, 796, 808 (Tex. Crim. App. 2014) (likewise suggesting that this language allows warrantless searches that do not come “within a recognized [warrant] exception”). For further discussion of *Ryce* and *Villarreal*, *see infra* notes 322–329 and accompanying text.

163. *McArthur*, 531 U.S. at 331.

164. *Id.*

balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable.”¹⁶⁵

But the two cases *McArthur* cited in support of that balancing test were both special needs cases.¹⁶⁶ Moreover, although this sentence from *McArthur* arguably provides some precedent for the reasonableness-balancing model, the Court did not deviate substantially from the warrant-presumption model there. Instead, the Court followed other exigent circumstances cases in which, in *McArthur*’s words, the Justices had allowed “temporary restraints” that were necessary to protect evidence until a warrant could be secured.¹⁶⁷ Finally, to the extent that some language in *McArthur* offers some support for the reasonableness-balancing model, the Court in that case made the same error repeated later in *Samson* by relying on the balancing test applied, under the warrant-presumption model, exclusively in administrative inspection cases.

Immediately following *King*’s first quotation from *McArthur* about the “circumstances” that justify warrantless searches, the majority opinion in *King* quoted *Maryland v. Buie* for the proposition that “[t]hose circumstances diminish the need for a warrant” in several situations, such as when “the public interest is such that neither a warrant nor probable cause is required.”¹⁶⁸ When read in context, however, the *Buie* Court was simply explaining the conditions under which the Court has recognized categorical exceptions to the “general[]” warrant requirement, and the cases it cited were all following the warrant-presumption model.¹⁶⁹

Interestingly, *King* did not rely on *Buie*’s statement at the beginning of the same paragraph that the Fourth Amendment prohibits only unreasonable searches and seizures and “[o]ur cases show” that the Court has applied the balancing test “in determining reasonableness.”¹⁷⁰

165. *Id.*, quoted in *Maryland v. King*, 569 U.S. 435, 448, 463 (2013).

166. *See id.* (citing *Delaware v. Prouse*, 440 U.S. 648, 653–54 (1979) (using the balancing test in evaluating highway safety automobile stops); *United States v. Brignoni-Ponce*, 422 U.S. 873, 877–78 (1975) (applying the test in a case involving immigration automobile stops near the border)).

167. *Id.* at 334.

168. *King*, 569 U.S. at 447 (quoting *Maryland v. Buie*, 494 U.S. 325, 331 (1990)). As examples of other circumstances that authorize warrantless searches, *King* cited *Samson* along with several Supreme Court precedents recognizing warrant exceptions under the warrant-presumption model. *See id.*

169. *Buie*, 494 U.S. at 331 (citing *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 619–20 (1989) (administrative search); *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (same); *New Jersey v. T.L.O.*, 469 U.S. 325, 340–41 (1985) (same); *Terry v. Ohio*, 392 U.S. 1, 20 (1968) (stop and frisk)).

170. *Id.*

But both precedents *Buie* cited in support of balancing were special needs cases.¹⁷¹ Moreover, in holding that law enforcement officials may conduct “cursory” protective sweeps when they have reasonable suspicion to believe “an individual posing a danger” to them is on the premises, the *Buie* Court rejected the State’s contention that “a general reasonableness balancing test” ought to permit protective sweeps whenever police enter a home to make an arrest for a violent crime.¹⁷² Instead, the Court adopted the “alternative” argument that a protective sweep “fall[s] within the ambit” of the *Terry* line of cases and should therefore be governed by “a *Terry*-type standard” of reasonable suspicion.¹⁷³ Quoting the balancing analysis articulated in *Terry*, the *Buie* Court thought that the “balance struck” in *Terry* and its progeny was equally applicable to protective sweeps.¹⁷⁴ *Buie* therefore fits squarely in the warrant-presumption model camp, following in *Terry*’s footsteps and recognizing a categorical exception to the warrant requirement.¹⁷⁵

As the fourth and final source of support for the reasonableness-balancing model, *King* quoted the statement in *New Jersey v. T.L.O.* that, “[a]lthough the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place.”¹⁷⁶ In *T.L.O.*, the Court allowed school officials to conduct an administrative inspection of a high school student’s purse based on “reasonable grounds for suspecting” the search would lead to evidence the student

171. See *id.* (citing *United States v. Villamonte-Marquez*, 462 U.S. 579, 588 (1983) (customs search); *Prouse*, 440 U.S. at 653–54 (highway safety stop)).

172. *Id.* at 335, 334, 330 (also allowing automatic, suspicionless sweeps of “spaces immediately adjoining the place of arrest” as part of a search incident to arrest).

173. *Id.* at 330.

174. *Id.* at 332; see also *id.* at 331 (describing *Terry* as “most instructive for present purposes”); *id.* at 334 (concluding that the “balance” adopted in the *Terry* line of cases was also “the proper one” there).

175. But see *United States v. Gould*, 364 F.3d 578, 584 (5th Cir. 2004) (en banc) (asserting that *Buie* was resolved on “the same general reasonableness[] balancing test” articulated in *Knights*, and applying that “balancing principle” in holding that protective sweeps are not confined to searches incident to arrest), *overruled on other grounds by* *Kentucky v. King*, 563 U.S. 452 (2011). But see *United States v. Taylor*, 248 F.3d 506, 513 (6th Cir. 2001) (agreeing that *Buie* did not suggest an arrest was “a mandatory prerequisite” for a protective sweep, without mentioning a balancing test and in fact pointing out that *Buie* was “based upon the reasoning set forth” in the *Terry* line of cases).

176. *Maryland v. King*, 569 U.S. 435, 461–62 (2013) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985)).

had violated either the law or school rules.¹⁷⁷ After the sentence quoted in *King* about the importance of “context” in determining the reasonableness of a search, the *T.L.O.* Court noted that “[t]he determination of the standard of reasonableness governing any specific class of searches” necessitates application of *Camara*’s balancing test.¹⁷⁸ Elsewhere the *T.L.O.* opinion similarly discussed the balancing test¹⁷⁹ and the need to assess “the legality of a search of a student . . . depend[ing] simply on the reasonableness, under all the circumstances, of the search.”¹⁸⁰ But *T.L.O.* involved an administrative inspection—a search performed by school personnel, not law enforcement, and designed to serve the special need of “maintaining security and order in the schools.”¹⁸¹ And the only precedents cited to support either a totality-of-the-circumstances approach or a balancing test were other administrative search cases and *Terry*,¹⁸² which illustrates, as discussed above,¹⁸³ the Court’s use of a balancing approach in analyzing whether to create a new categorical exception to the warrant requirement. While the Court’s more general statements in *T.L.O.* might be read to offer some support for the reasonableness-balancing model, today *T.L.O.* is viewed as a straightforward administrative inspection case¹⁸⁴ and therefore cannot be read to justify a more expansive use of the balancing test.

Of the seven precedents the Court cited in *Knights*, *Samson*, and *King* to support the reasonableness-balancing model,¹⁸⁵ four—*Robinette*, *Martinez-Fuerte*, *Acton*, and *Buie*—are clearly distinguishable. At best, then, the other three opinions—*Houghton*, *McArthur*, and *T.L.O.*—

177. *T.L.O.*, 469 U.S. at 341–42.

178. *Id.* at 337 (citing *Camara v. Mun. Ct.*, 387 U.S. 523, 536–37 (1967)).

179. *See id.* at 341 (“Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard.”).

180. *Id.*

181. *Id.* at 340.

182. *See id.* at 341–42.

183. *See supra* notes 97–100 and accompanying text.

184. *See, e.g.*, *Bd. of Educ. v. Earls*, 536 U.S. 822, 829 (2002) (citing *T.L.O.* for the proposition that “‘special needs’ inhere in the public school context”); *Ferguson v. City of Charleston*, 532 U.S. 67, 79 n.15 (2001) (aligning *T.L.O.* with the special needs cases); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995) (describing *T.L.O.* as a case finding “‘special needs’ to exist in the public school context”).

185. *See Maryland v. King*, 569 U.S. 435, 447–48, 461–63 (2013); *Samson v. California*, 547 U.S. 843, 848–50, 855 n.4 (2006); *United States v. Knights*, 534 U.S. 112, 118–19 (2001).

include some general language supporting the use of a balancing approach to evaluate the constitutionality of warrantless searches. But *T.L.O.* involved an administrative inspection, and all three opinions derived their support for a balancing analysis exclusively from *Terry* and the special needs cases. Moreover, aside from their references to a balancing test, *Houghton* and *McArthur* did not depart substantially from the warrant-presumption model. While the constitutionality of administrative inspection schemes does turn on a balancing test, the precedent the Supreme Court cited in the reasonableness-balancing model trilogy does not provide much support for extending the balancing analysis beyond the confines of that particular warrant exception.

C. Other Possible Sources of Support

If the Court had scant precedent to offer in support of the reasonableness-balancing model in *Knights*, *Samson*, and *King*, did the Justices miss anything? Is there any other Fourth Amendment jurisprudence they could have cited? In exploring that question, this Section considers first other Supreme Court opinions that have used the touchstone mantra and then additional precedents relied on by others advocating for the balancing model. Here again, general language can be found in a few opinions that arguably refers to an ad hoc balancing test, but even those cases do not provide a great deal of support for that approach because, for example, they rely on warrant-presumption model precedent or do not stray far from that model.

The three reasonableness-balancing model opinions were not the first Supreme Court decisions to refer to “reasonableness” as “the touchstone of the Fourth Amendment.”¹⁸⁶ But, with the exception of the balancing model trilogy, no Supreme Court opinion that has used the “touchstone” phrase has applied, or endorsed, a balancing approach in assessing the permissibility of law enforcement activities beyond the confines of the warrant-presumption model.

The language initially appeared in a Supreme Court opinion in 1971, in *Hill v. California*.¹⁸⁷ The phrase “touchstone of reasonableness” was used there to make clear that the Fourth Amendment does not require “certainty” and that probable cause can exist even where police turn out to be mistaken.¹⁸⁸ *Hill*’s discussion of probable cause therefore

186. *King*, 569 U.S. at 448; *Samson*, 547 U.S. at 855 n.4; *Knights*, 534 U.S. at 118.

187. *Hill v. California*, 401 U.S. 797 (1971).

188. *Id.* at 804. For other opinions using the phrase to similar effect, see *Heien v. North Carolina*, 574 U.S. 54, 60–61 (2014), *Illinois v. Rodriguez*, 497 U.S. 177, 184–86 (1990), *Maryland v. Garrison*, 480 U.S. 79, 87–88 (1985), and *New Jersey v. T.L.O.*, 469 U.S. 325, 346 (1985).

provides no support for using an ad hoc balancing test to resolve the constitutionality of law enforcement searches and seizures.

Touchstone language was next used in the Court's 1977 per curiam opinion in *Pennsylvania v. Mimms*.¹⁸⁹ *Mimms* involved a traffic stop, and the Court held there that police are allowed to require the driver of a lawfully stopped vehicle to exit from the car.¹⁹⁰ Quoting *Terry*, the Court observed that "[t]he touchstone of our analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.'"¹⁹¹ The Court then cited one of its administrative inspection opinions for the proposition that reasonableness turns on a balancing of the relevant government and individual interests.¹⁹² Thus, *Mimms* was evaluating the permissible scope of a *Terry*-like stop, and it does not support the use of a balancing test beyond the confines discussed above: in resolving the constitutionality of special needs searches, and in ruling on the creation and scope of categorical warrant exceptions.

The next Supreme Court opinion to use the "touchstone" language in a different context was the 1991 ruling in *Florida v. Jimeno*.¹⁹³ To start off its substantive Fourth Amendment analysis, the *Jimeno* Court observed that "[t]he touchstone of the Fourth Amendment is reasonableness."¹⁹⁴ The Court then went on to say: "[t]he Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable."¹⁹⁵ In support of the "touchstone" sentence, the Court cited *Katz v. United States*.¹⁹⁶ Although the Court offered no explanation for the citation, presumably it was referring to the portion of Justice Harlan's concurrence in *Katz* that defined a "search" for Fourth Amendment purposes as a violation

189. *Pennsylvania v. Mimms*, 434 U.S. 106, 108–09 (1977) (per curiam).

190. *See id.* at 111.

191. *Id.* at 108–09 (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968)). For the original context in which this language appeared in *Terry*, see *supra* note 98 and accompanying text. For other opinions in the *Terry* line of cases making similar use of the touchstone clause, see *Maryland v. Wilson*, 519 U.S. 408, 411 (1997), and *Michigan v. Long*, 463 U.S. 1032, 1051 (1983).

192. *See Mimms*, 434 U.S. at 109 (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975)). For a similar opinion, see *Wilson*, 519 U.S. at 411–12.

193. *Florida v. Jimeno*, 500 U.S. 248, 250 (1991).

194. *Id.*

195. *Id.* For similar language, see *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995), discussed *supra* notes 149–155 and accompanying text.

196. *See Jimeno*, 500 U.S. at 250 (citing *Katz v. United States*, 389 U.S. 347, 360 (1967)).

of one's "reasonable expectation of privacy" and therefore had nothing to do with what constitutes a "reasonable" search.¹⁹⁷ Moreover, reading the two consecutive sentences in *Jimeno* together suggests a different interpretation of the "touchstone" language, the point that only "unreasonable" searches and seizures are forbidden by the Fourth Amendment. But this straightforward observation is self-evident—after all, what the Reasonableness Clause prohibits are "unreasonable searches and seizures"¹⁹⁸—and therefore does not help justify a reasonableness-balancing approach.

The "touchstone" phrase also appeared in the Court's brief discussion of the knock-and-announce rule in *United States v. Ramirez*.¹⁹⁹ Citing *Mimms*, the *Ramirez* Court observed that "[t]he general touchstone of reasonableness which governs Fourth Amendment analysis . . . governs the method of execution of the warrant."²⁰⁰ The Court arguably went on to use balancing-type language in saying that the Constitution may prohibit "[e]xcessive or unnecessary destruction of property" following a lawful entry, but the Court did not engage in any sort of explicit balancing analysis in *Ramirez*.²⁰¹ Rather, the Court applied its precedents allowing no-knock entries when police have reasonable suspicion that knocking would be dangerous and then concluded that the officers had a good reason for breaking a garage window to enter Ramirez's home and therefore their "manner" of entry was "clearly reasonable."²⁰² Although the Court did not elaborate further or cite any support, its reasoning seems reminiscent of the excessive force cases, which have similarly made clear that the Fourth Amendment governs not just "when" but also "how" a seizure (here, entry) is made and have instructed judges to determine whether a

197. *Katz*, 389 U.S. at 360–61 (Harlan, J., concurring); cf. *California v. Ciraolo*, 476 U.S. 207, 211 (1986) ("The touchstone of the Fourth Amendment analysis is whether a person has a 'constitutionally protected reasonable expectation of privacy.'" (quoting *Katz*, 389 U.S. at 360 (Harlan, J., concurring))); *Oliver v. United States*, 466 U.S. 170, 177 (1984) ("Since *Katz* . . . , the touchstone of [Fourth] Amendment analysis has been the question whether a person has a 'constitutionally protected reasonable expectation of privacy.'" (quoting *Katz*, 389 U.S. at 360 (Harlan, J., concurring))).

198. U.S. CONST. amend. IV.

199. *United States v. Ramirez*, 523 U.S. 65, 71 (1998).

200. *Id.* (citing *Pennsylvania v. Mimms*, 434 U.S. 106, 108–09 (1977) (per curiam)).

201. *Id.*

202. *Id.* at 71–72.

particular use of force was “objectively unreasonable” under the totality of the circumstances.²⁰³

The “touchstone” language was then featured in a school drug testing case, *Board of Education v. Earls*, where the Court noted that “‘reasonableness’ . . . is the touchstone of the constitutionality of a governmental search.”²⁰⁴ Although Justice Thomas’s majority opinion in *Earls* asserted that the Court “generally determine[s] the reasonableness of a search” by balancing, this language appeared in his discussion of searches that are “not in any way related to the conduct of criminal investigations” and the only cases cited in support of the balancing test were—like *Earls* itself—other administrative inspection cases.²⁰⁵

Ironically, the next Supreme Court opinion to use the “touchstone” phrase did so in the context of explaining the warrant-presumption model. In *Brigham City v. Stuart*, which involved the warrant exception for exigent circumstances, the Court, after noting that warrantless intrusions are “‘presumptively unreasonable,’” pointed out that, “[n]evertheless, because the ultimate touchstone of the Fourth Amendment is ‘reasonableness,’ the warrant requirement is subject to certain exceptions.”²⁰⁶ This use of the phrase, which the Court has repeated on several occasions,²⁰⁷ directly supports the warrant-presumption model instead of the reasonableness-balancing model.²⁰⁸

Thus, none of the other Supreme Court opinions in which the “touchstone” mantra appeared furnish much of a basis for using a freewheeling balancing analysis to test the constitutionality of searches and seizures. All of those cases seem to fit comfortably within the warrant-presumption model and restrict the balancing approach to either evaluating administrative inspections or ruling on the creation and scope of categorical warrant exceptions. The remainder of this Section turns to other potential sources of support for the

203. *Graham v. Connor*, 490 U.S. 386, 395, 397 (1989) (emphasis omitted). For discussion of the excessive force cases, see *supra* notes 110–114 and accompanying text.

204. *Bd. of Educ. v. Earls*, 536 U.S. 822, 828 (2002).

205. *Id.* at 829.

206. *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (internal quotation marks omitted) (quoting *Groh v. Ramirez*, 540 U.S. 551, 559 (2004)).

207. See *Fernandez v. California*, 571 U.S. 292, 298 (2014); *Missouri v. McNeely*, 569 U.S. 141, 167 (2013); *Kentucky v. King*, 563 U.S. 452, 459 (2011); *Michigan v. Fisher*, 558 U.S. 45, 47 (2009) (per curiam).

208. *But see* *Murphy*, *supra* note 8, at 184 n.160, 184–85 (interpreting this language as “adopting the disjunctive” view of the relationship between the Fourth Amendment’s two clauses and giving “reasonableness . . . equal footing with . . . the warrant presumption”).

reasonableness-balancing model raised by the parties in *Maryland v. King*.

The State of Maryland's reply brief in *King* cited two additional administrative inspection opinions: *Ferguson v. City of Charleston*²⁰⁹ and *Michigan Department of State Police v. Sitz*.²¹⁰ After quoting the language from *Martinez-Fuerte* discussed above, which pointed out that the Fourth Amendment does not necessarily require individualized suspicion,²¹¹ the State inserted a "see also" citation to *Ferguson* and *Sitz*.²¹² But the Supreme Court wisely chose not to rely on either of those opinions in *King*.

The State's reply brief quoted *Ferguson* as purportedly "acknowledging that warrantless searches *for law enforcement purposes* may be acceptable even without probable cause when the individuals to be searched 'have a lesser expectation of privacy than the public at large.'" ²¹³ In *Ferguson*, the Court struck down a policy of drug testing pregnant women because it was "designed to obtain evidence of criminal conduct . . . that would be turned over to the police" and therefore did not qualify as a special needs search.²¹⁴ In the footnote cited by the State, the majority was responding to the dissent's reliance on *Griffin v. Wisconsin*²¹⁵ for the proposition that "the special needs doctrine 'is ordinarily employed . . . to enable searches by law enforcement officials who . . . ordinarily have a law enforcement objective.'" ²¹⁶ In rejecting that argument, the *Ferguson* majority distinguished *Griffin* on a number of grounds, most notably, that a probation officer is different from "the police officer who normally conducts searches against the ordinary citizen."²¹⁷

The "[f]inal[]" distinguishing feature *Ferguson* pointed to, in the part of the opinion quoted by Maryland's reply brief, was that "*Griffin* is properly read as limited by the fact that probationers have a lesser expectation of privacy than the public at large."²¹⁸ But *Griffin*'s reliance on probationers' reduced expectation of privacy is typical of the

209. *Ferguson v. City of Charleston*, 532 U.S. 67 (2001).

210. *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990).

211. *See supra* note 142 and accompanying text.

212. *See* Reply Brief of Petitioner, *supra* note 78, at 6.

213. *Id.* (emphasis added) (quoting *Ferguson*, 532 U.S. at 80 n.15).

214. *Ferguson*, 532 U.S. at 70, 86.

215. *Griffin v. Wisconsin*, 483 U.S. 868 (1987).

216. *Ferguson*, 532 U.S. at 79 n.15 (emphasis omitted) (quoting *id.* at 100 (Scalia, J., dissenting)).

217. *Id.* (quoting *Griffin*, 483 U.S. at 876).

218. *Id.* (citing *Griffin*, 483 U.S. at 874–75).

balancing seen in the Supreme Court's special needs precedents, which often make similar points in minimizing the invasiveness of the administrative search in question.²¹⁹ *Ferguson* stressed the importance of a special need in striking down the drug testing program there, and its discussion of *Griffin* does not, as the State of Maryland argued, suggest that either opinion envisioned that diminished expectations of privacy could justify suspicionless searches for "law enforcement purposes" that fall outside the context of administrative inspections.

In addition to *Ferguson*, the State's reply brief in *Maryland v. King* quoted *Sitz*, another administrative inspection case, as rejecting the "requirement to show [a] 'special need' search before engaging in [a] balancing test."²²⁰ This is a bit more complicated. *Sitz* applied a balancing test in upholding the constitutionality of a sobriety checkpoint,²²¹ and the language quoted by the State—the Court's use of the two words "special need"—appeared in the context of the Court's reply to the respondents' argument that the balancing test the Court had applied in *Brown v. Texas* "was not the proper method of analysis" and that some individualized suspicion was required before a vehicle could be stopped at a DUI checkpoint.²²² *Sitz* continued summarizing the respondents' contentions as follows: "[r]espondents argue that there must be a showing of some special governmental need 'beyond the normal need' for criminal law enforcement before a balancing analysis is appropriate, and that petitioners have demonstrated no such special need."²²³ "But," the Court responded, apparently rejecting some or all of the respondents' points, the special needs precedents were not "designed to repudiate our prior cases dealing with police stops of motorists on public highways"²²⁴; *Martinez-Fuerte*²²⁵ and *Brown v.*

219. See, e.g., *Bd. of Educ. v. Earls*, 536 U.S. 822, 830–32 (2002) (students); *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 672 (1989) (Customs Service employees). Given the pervasiveness of this reasoning in the Court's special needs decisions, the *King* majority's effort to distance special needs searches from DNA testing of arrestees on the grounds that the former "intrude upon substantial expectations of privacy" was somewhat mysterious. *Maryland v. King*, 569 U.S. 435, 462–63 (2013).

220. Reply Brief of Petitioner, *supra* note 78, at 6 (quoting *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 450 (1990)); see also Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 71, at 14 (making the same argument); cf. 4 LAFAVE, *supra* note 47, § 9.7(b), at 979 (agreeing with this argument but only as applied to "highway checkpoints").

221. See *Sitz*, 496 U.S. at 455.

222. *Id.* at 449.

223. *Id.* at 450 (quoting *Von Raab*, 489 U.S. at 665).

224. *Id.* (emphasis added).

225. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

Texas.²²⁶ Those two opinions, the *Sitz* Court said, “utilized a balancing analysis” and “are the relevant authorities here.”²²⁷

Although *Sitz* did not then use the term “special needs” in upholding Michigan’s sobriety checkpoints, it did explain that the checkpoints were designed to alleviate the “serious public danger” that had been created by “the drunken driving problem” and had led to “increasing slaughter on our highways.”²²⁸ This is essentially a special needs argument, as the Court later recognized in *City of Indianapolis v. Edmond*, referring to the checkpoints in *Sitz* as addressing a “highway safety concern,” an “immediate, vehicle-bound threat to life and limb.”²²⁹ Therefore, the Court concluded in *Edmond*, the sobriety checkpoints in *Sitz* were not “designed primarily to serve the general interest in crime control” even though they had “the same ultimate purpose of arresting those suspected of committing crimes.”²³⁰ And *Edmond* struck down the narcotics checkpoint at issue there on the grounds that its “primary purpose,” unlike a sobriety checkpoint, was “to uncover evidence of ordinary criminal wrongdoing.”²³¹ Thus, whatever part of the respondents’ argument the *Sitz* Court meant to repudiate by the ambiguous word “[b]ut,” *Edmond*’s treatment of *Sitz* as a special needs case suggests—contrary to the State of Maryland’s reading of *Sitz*—that a special need outside “the general interest in crime control” is critical to trigger a balancing analysis.²³²

Moreover, the two opinions the *Sitz* Court called “the relevant authorities” on highway stops were *Martinez-Fuerte*, the administrative inspection case that, as discussed above, used the balancing test in upholding immigration stops at fixed Border Patrol checkpoints,²³³ and

226. *Brown v. Texas*, 443 U.S. 47 (1979).

227. *Sitz*, 496 U.S. at 450.

228. *Id.* at 451, 453 (quoting *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957)).

229. *City of Indianapolis v. Edmond*, 531 U.S. 32, 43 (2000); *see also* *Illinois v. Lidster*, 540 U.S. 419, 424 (2004) (describing the checkpoint in *Sitz* as serving “special law enforcement concerns”); 4 LAFAVE, *supra* note 47, § 9.7, at 968 (pointing out that sobriety checkpoints are “best viewed” as administrative searches).

230. *Edmond*, 531 U.S. at 42; *see also* *Ferguson v. City of Charleston*, 532 U.S. 67, 83 n.21 (2001) (noting that special needs searches may lead to a “discovery of evidence” that is “merely incidental to the purposes of the administrative search”).

231. *Edmond*, 531 U.S. at 42.

232. *Id.* at 42–43.

233. *United States v. Martinez-Fuerte*, 428 U.S. 543, 554–55 (1976). For discussion of *Martinez-Fuerte*, *see supra* notes 140–146 and accompanying text.

Brown v. Texas, which involved a *Terry* stop.²³⁴ So what support does the Court's brief opinion in *Brown* offer to the State of Maryland's argument that balancing can occur outside the confines of the special needs cases?

The reasonableness of a seizure short of an arrest turns on a balancing test, the Court said in *Brown*, identifying three factors to be "weigh[ed]" in determining the permissibility of the seizure: the "gravity" of the law enforcement interest; "the degree to which the seizure advances" that interest; and the "severity" of the intrusion.²³⁵ In support of the appropriateness of a balancing analysis and these three factors, *Brown* cited *Terry*,²³⁶ *Pennsylvania v. Mimms*,²³⁷ *United States v. Brignoni-Ponce*, an administrative inspection case involving immigration automobile stops near the border,²³⁸ and *Dunaway v. New York*.²³⁹

As discussed above, the first three opinions do not support use of a balancing approach outside the confines of the warrant-presumption model: to evaluate the constitutionality of special needs searches and to decide on the creation and scope of the warrant exceptions. And *Dunaway*, in holding that police needed probable cause to take a suspect to the station for questioning,²⁴⁰ expressly refused to extend the "narrow scope" of the *Terry* "balancing test" and to "adopt a multifactor balancing test of 'reasonable police conduct under the circumstances'" to evaluate the constitutionality of seizures that do not rise to the level of arrests.²⁴¹ The cases cited in *Brown* therefore do not provide much support for the reasonableness-balancing model.

234. *Brown v. Texas*, 443 U.S. 47, 50 (1979).

235. *Id.* at 51. *But see* *Maryland v. King*, 569 U.S. 435, 459 (2013) (distinguishing, in contrast to the second *Brown* factor, between the "constitutionality" of a search and the "efficacy" of a search "for its purpose").

236. *See Brown*, 443 U.S. at 50 (citing *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). For discussion of *Terry*, see *supra* notes 97–100 and accompanying text.

237. *See Brown*, 443 U.S. at 50 (citing *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977) (per curiam)). For discussion of *Mimms*, see *supra* notes 189–192 and accompanying text.

238. *See Brown*, 443 U.S. at 50–51 (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 878–83 (1975)); see also *supra* note 166 and accompanying text.

239. *See Brown*, 443 U.S. at 50 (citing *Dunaway v. New York*, 442 U.S. 200, 209–10 (1979)).

240. *See Dunaway*, 442 U.S. at 216.

241. *Id.* at 210, 213; see *id.* at 214 (arguing that "the requisite 'balancing'" had already been done in "centuries of precedent" requiring probable cause for seizures); see also *Hayes v. Florida*, 470 U.S. 811, 815–16 (1985) (likewise holding that a suspect may not be transported to the police station for

Moreover, even the *Brown* Court itself did not stray far from the warrant-presumption model. Immediately after laying out its three factors, *Brown* cautioned, using standard warrant-presumption model language, that the need to prevent the “unfettered discretion of officers in the field” dictated that Fourth Amendment seizures must be based either on the reasonable suspicion required by *Terry* or, channeling the special needs cases, on “a plan embodying explicit, neutral limitations on the conduct of individual officers.”²⁴² Although the Court then went on to briefly mention two of the three factors,²⁴³ the focus of its analysis was the finding that the seizure in that case was impermissible because the police lacked reasonable suspicion.²⁴⁴ Thus, while *Brown* arguably purported to adopt a balancing approach, the opinion reads much like a warrant-presumption model decision—either addressing the permissible scope of a stop and frisk along the same lines as *Terry* and *Mimms*, or simply applying the stop-and-frisk analysis to the facts of the case.²⁴⁵

The Court applied the three *Brown* factors not only in *Sitz*,²⁴⁶ but also in a later checkpoint case, *Illinois v. Lidster*,²⁴⁷ which was cited in the Solicitor General’s brief in *Maryland v. King*. The brief quoted *Lidster* to support the argument that a warrant is unnecessary when a police intrusion “is not the kind of event that involves suspicion, or lack of suspicion, of the relevant individual.”²⁴⁸ At issue in *Lidster* was the constitutionality of a highway checkpoint that was set up at the site of a recent hit-and-run to ask passing motorists whether they had any

purposes of fingerprinting without probable cause); *Davis v. Mississippi*, 394 U.S. 721, 727–28 (1969) (same).

242. *Brown*, 443 U.S. at 51 (citing *Delaware v. Prouse*, 440 U.S. 648, 663 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 558–62 (1976)).

243. *See id.* at 52 (reasoning that preventing crime is a “weighty social objective,” and assuming that interest is “served to some degree” by a stop that is not supported by reasonable suspicion).

244. *See id.* at 51–52; *see also id.* at 53 (explaining, in summarizing its holding, that *Brown*’s Fourth Amendment rights were violated because the police did not have reasonable suspicion to stop him).

245. *Cf.* 4 LAFAVE, *supra* note 47, § 9.7(b), at 979–80 (observing that Indianapolis’s narcotics checkpoint might have survived an “unadorned” *Brown* approach but faltered under *Edmond*’s later inclusion of the “additional requirement” of a purpose beyond general crime control). Interestingly, the *Edmond* majority did not cite *Brown*, although it featured prominently in the dissent. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 49–50, 53–54 (2000) (Rehnquist, C.J., dissenting).

246. *See Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444, 451–55 (1990).

247. *Illinois v. Lidster*, 540 U.S. 419 (2004).

248. Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 71, at 32 (quoting *Lidster*, 540 U.S. at 425).

information about the accident.²⁴⁹ The Court found that the checkpoint satisfied *Edmond*'s requirement of a special need divorced from "general 'crime control' purposes," reasoning that "the phrase 'general interest in crime control' does not refer to every 'law enforcement' objective" and the "primary law enforcement purpose" of "information-seeking highway stops" was "not to determine whether a vehicle's occupants were committing a crime" but instead to seek their assistance in "apprehend[ing] . . . other individuals."²⁵⁰ Citing *Martinez-Fuerte* and *Sitz*, the *Lidster* Court noted that it had previously upheld other checkpoints that served "special law enforcement concerns," and then, in the part of the opinion referenced by the Solicitor General, pointed out that, "by definition, the concept of individualized suspicion has little role to play" when law enforcement officials are simply seeking information from the public.²⁵¹ The Court went on to uphold the constitutionality of the hit-and-run checkpoint under the three-factor balancing test articulated in *Brown v. Texas*.²⁵²

One scholar has argued that *Lidster*, like *Samson*, is an example of "free-form balancing" outside the special needs context because the information-seeking checkpoint in *Lidster* was designed "to discover evidence of a crime" and therefore "canonical law enforcement activity."²⁵³ But, as noted above, the Court aligned the *Lidster* checkpoint with the special needs immigration and sobriety checkpoints, and seemed to find that a special need arises "when police 'expect[]' the seizure of [a] witness 'to help them apprehend . . . other individuals'" rather than "the witness herself."²⁵⁴ Moreover, even though *Lidster* ended up applying the three-factor *Brown* test, the balancing analysis required by *Brown* is functionally indistinguishable from the weighing of government versus private interests that is typically done in the administrative inspection cases.²⁵⁵ Thus, *Lidster* is "conventionally"

249. See *Lidster*, 540 U.S. at 421.

250. *Id.* at 423–24 (emphasis omitted) (quoting *Edmond*, 531 U.S. at 41, 44 n.1).

251. *Id.* at 424.

252. See *id.* at 426–28.

253. Kaye, *supra* note 33, at 552, 551 n.98.

254. Kit Kinports, Camreta and Al-Kidd: *The Supreme Court, the Fourth Amendment, and Witnesses*, 102 J. CRIM. L. & CRIMINOLOGY 283, 306 (2012) (first alteration in original) (quoting *Lidster*, 540 U.S. at 423). But see George M. Dery, III & Kevin Meehan, *Making the Roadblock a "Routine Part of American Life:" Illinois v. Lidster's Extension of Police Checkpoint Power*, 32 AM. J. CRIM. L. 105, 118 (2004) (taking the position that the Court "stopped short" of finding a special need in *Lidster*).

255. For examples of administrative inspection opinions in which the Court impliedly incorporated the three *Brown* factors in its balancing analysis, see *Bd. of Educ. v. Earls*, 536 U.S. 822, 834 (2002) (taking into account the

viewed as a special needs case, and not an application of an ad hoc balancing test.²⁵⁶

In short, the Justices do not seem to have overlooked much helpful precedent in their reasonableness-balancing model decisions. The other Supreme Court opinions that have used the touchstone mantra did not apply a balancing test outside the confines of the warrant-presumption model, and the additional Supreme Court decisions suggested by others are likewise of little assistance.²⁵⁷ Just like the case law cited in the Supreme Court's trilogy, at best one can find brief general language in a few opinions—*Sitz* and *Brown*—supporting the balancing model. But even those cases are problematic: their reasoning is vague; they ground the balancing test solely on warrant-presumption model cases; or they do not stray far from the warrant-presumption model. Thus, those decisions do not provide a solid foundation for using a balancing test other than to evaluate the constitutionality of special needs searches and to rule on the creation and scope of categorical warrant exceptions.

D. Cases Going the Other Way

The Court's three reasonableness-balancing model opinions were not only unable to find much in the way of precedent that affirmatively endorsed an ad hoc balancing approach, but they also ignored several decisions that refused to engage in a balancing analysis.²⁵⁸ One of those cases, *Atwater v. City of Lago Vista*, was decided eight months before

“minimally intrusive nature” of the drug tests, “the nature and immediacy of the government’s concerns,” and “the efficacy” of the drug testing policy “in meeting them”), and *Camara v. Mun. Ct.*, 387 U.S. 523, 537 (1967) (considering what public interests housing inspections further, how intrusive they are, and also whether “any other canvassing technique would achieve acceptable results”).

256. Kaye, *supra* note 33, at 552 n.117 (citing other sources). For further discussion of these roadblock cases, see *infra* notes 456–477 and accompanying text.

257. For discussion of a lower court opinion relying on *United States v. Jacobsen*, 466 U.S. 109 (1984), to support a balancing analysis, see *infra* notes 450–452 and accompanying text.

258. *Cf.* *United States v. Knights*, 534 U.S. 112, 122 (2001) (quoting *Whren v. United States*, 517 U.S. 806, 813 (1996), only on the general irrelevance of police officer motivation in Fourth Amendment analysis). For discussion of *Whren*, see *infra* notes 266–271 and accompanying text. For other examples of cases in which the Court declined to adopt a balancing approach, see *Bailey v. United States*, 568 U.S. 186, 201–02 (2013), *Arizona v. Hicks*, 480 U.S. 321, 328–29 (1987), and *Dunaway v. New York*, 442 U.S. 200, 211–12 (1979). For discussion of these three cases, see *supra* notes 104–109, 239–241 and accompanying text and *infra* note 452 and accompanying text.

Knights.²⁵⁹ Interestingly, it was the arrestee in *Atwater* who urged the Court to apply a balancing test and forbid custodial arrests for minor offenses that carry no prison sentence and create “no compelling need for immediate detention.”²⁶⁰ And the dissenting Justices agreed, invoking the touchstone mantra and *Wyoming v. Houghton*’s two-step approach and noting that, “in determining reasonableness, ‘[e]ach case is to be decided on its own facts and circumstances.’”²⁶¹

But the majority, referencing the two-step originalist approach Justice Scalia outlined in *Houghton* and *Vernonia School District 47J v. Acton*, responded that *Atwater* was requesting “a new rule of constitutional law” based on the view that, when history “fails to speak conclusively,” judges are free to balance governmental and individual interests “by subjecting particular contemporary circumstances to traditional standards of reasonableness.”²⁶² Although the Court acknowledged that “*Atwater* might well prevail” if a balancing test were applied to the facts of her case, the majority cautioned that it had “traditionally” hesitated to say that a “responsible Fourth Amendment balance” is “well served by standards requiring sensitive, case-by-case determinations of government need.”²⁶³ Rather, the Court observed, “the object in implementing [the Fourth Amendment’s] command of reasonableness” is to devise “clear and simple” rules that can be “applied with a fair prospect of surviving judicial second-guessing,” and therefore judges “attempting to strike a reasonable Fourth Amendment balance . . . credit the government’s side with an essential interest in readily administrable rules.”²⁶⁴ The Court concluded by describing “current doctrine” as expressing a “preference for categorical treatment of Fourth Amendment claims” rather than “individualized review,” quoting *Dunaway v. New York* in holding that the probable cause requirement governs “all arrests, without the need to ‘balance’ the

259. *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

260. *Id.* at 346.

261. *Id.* at 360–61 (O’Connor, J., dissenting) (alteration in original) (quoting *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931)); *see also id.* at 366 (taking the position that the Fourth Amendment requires issuance of a citation for a fine-only offense absent “‘specific and articulable facts which . . . reasonably warrant [the additional] intrusion’ of a full custodial arrest” (alteration in original) (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968))).

262. *Id.* at 345–46 (majority opinion) (citing *Wyoming v. Houghton*, 526 U.S. 295, 299–300 (1999); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652–53 (1995)). For discussion of these two cases, see *supra* notes 130–138, 149–155 and accompanying text.

263. *Atwater*, 532 U.S. at 346–47.

264. *Id.* at 347.

interests and circumstances involved in particular situations.”²⁶⁵ *Atwater*’s characterization of the balancing test as a “new rule” that contravened “current doctrine” therefore evidences the lack of precedential support for the reasonableness-balancing model.

The defendants similarly urged the Justices to use a balancing approach in *Whren v. United States*, arguing that “the balancing inherent in any Fourth Amendment inquiry” called for “weigh[ing] the governmental and individual interests implicated” in that case.²⁶⁶ In rejecting that approach and allowing undercover narcotics officers to make a seemingly pretextual traffic stop, a unanimous Court, in an opinion written by Justice Scalia, refused to take the bait and engage in a “detailed ‘balancing’ analysis.”²⁶⁷ The Court agreed that “in principle” all Fourth Amendment cases “turn[] upon a ‘reasonableness’ determination” and therefore “involve[] a balancing of all relevant factors,” and Justice Scalia cited some of the special needs cases as illustrations of opinions that performed an “actual ‘balancing’ analysis.”²⁶⁸ But the Court responded to the defendants’ call for a balancing test by maintaining that, “[w]ith rare exceptions not applicable here, . . . the result of that balancing is not in doubt” when a search or seizure is supported by probable cause.²⁶⁹

The “only” Supreme Court opinions that “actually . . . perform[ed] the ‘balancing’ analysis” in the face of probable cause, *Whren* continued, involved intrusions “conducted in an extraordinary manner, unusually harmful to an individual’s privacy or even physical interests.”²⁷⁰ The *Whren* Court, then, seemed to view the balancing test as

265. *Id.* at 352, 354 (quoting *Dunaway v. New York*, 442 U.S. 200, 208 (1979)).

266. *Whren v. United States*, 517 U.S. 806, 816 (1996).

267. *Id.* at 808–09, 818.

268. *Id.* at 817–18 (citing *Delaware v. Prouse* 440 U.S. 648, 654–55, 659, 661 (1979) (highway safety stop); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556–62 (1976) (immigration checkpoint); *United States v. Brignoni-Ponce*, 422 U.S. 873, 882–84 (1975) (immigration stops near the border)).

269. *Id.* at 817; *see also id.* at 818 (“[T]he usual rule [is] that probable cause to believe the law has been broken ‘outbalances’ private interest in avoiding police contact.”).

270. *Id.* at 818. Two of the four opinions *Whren* cited here as examples of cases that turned on a balancing analysis outside the special needs context fit clearly within the warrant-presumption framework. *See Wilson v. Arkansas*, 514 U.S. 927, 934 (1995) (recognizing possible exceptions to the knock-and-announce rule modeled on the warrant exception for exigent circumstances); *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (setting out the limits on the use of deadly force to catch a fleeing felon). The other two decisions suggest, unlike the reasonableness-balancing model, that in rare cases a balancing of the competing interests may protect defendants from intrusive invasions that would otherwise be permissible under the warrant-presumption model. *See*

a one-way ratchet, confining it to cases where the Justices are asked to determine the constitutionality of “extreme [law enforcement] practice[s],” and the Court found “no realistic alternative” to resolving “run-of-the-mine” Fourth Amendment cases other than by applying fixed rules, in *Whren*’s case, “the traditional common-law rule that probable cause justifies a search and seizure.”²⁷¹ *Whren*, like *Atwater*, therefore reflects a Court hesitant to adopt a freewheeling balancing test to resolve the constitutionality of Fourth Amendment searches and seizures.

This review of the Supreme Court’s Fourth Amendment case law—the opinions the Court cited in the reasonableness-balancing model trilogy as well as other possible precedent for a balancing approach—suggests, contrary to the views advanced by some scholars and in the three opinions themselves, that the Court did in fact introduce a new approach when it balanced the governmental and individual interests in evaluating the constitutionality of the law enforcement search of *Knights*’ home. The Court had previously weighed the relevant competing interests in earlier cases, but that balancing was typically done within the framework of the warrant-presumption model and was confined to the special needs context and cases ruling on the creation and scope of the categorical warrant exceptions. And the few Supreme Court opinions that included general language suggesting a bigger role for the balancing test derived support exclusively from warrant-presumption model cases or did not stray far from that model.

This is not to say that the Supreme Court decisions addressing warrant exceptions are a model of clarity and easy to catalogue, or to deny that they are subjective and open to question.²⁷² If anything, the preceding discussion suggests the opposite. But though these opinions may be controversial and subject to interpretation, they are distinguishable from the reasonableness-balancing model approach, which enables judges to engage in a never-ending, ad hoc balancing analysis

Winston v. Lee, 470 U.S. 753, 755, 760–61 (1985) (noting, in refusing to uphold a court order allowing nonconsensual surgery to remove a bullet from a suspect’s chest, that the Fourth Amendment’s “ordinary requirements” of a warrant and probable cause are “the threshold” for a “surgical search and seizure” and then, “[b]eyond these standards,” a balancing test must be applied); *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984) (acknowledging that exigent circumstances could justify a warrantless home entry to arrest for a “serious” crime, but refusing to allow a warrantless entry to arrest for a “minor” non-jailable DUI offense).

271. *Whren*, 517 U.S. at 818–19.

272. In fact, scholars cannot even agree how many different warrant exceptions the Court has created. See Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1620 & n.33 (2012).

to determine the constitutionality of a search or seizure depending on the facts of a particular case.

It remains to consider how much of a mark the Court's three balancing model opinions have actually made on Fourth Amendment jurisprudence. The following Part turns to that question.

III. THE LEGACY OF THE REASONABLENESS- BALANCING MODEL

As noted above, some academics are of the view that the Supreme Court has now completely abandoned the warrant-presumption model and converted to the reasonableness-balancing approach.²⁷³ In order to test that proposition, this Part of the Article first examines the Court's Fourth Amendment case law since *Maryland v. King* and then turns to the lower courts' treatment of the Court's balancing model trilogy. In the end, the Article finds little support for scholars' fears.

The Supreme Court has by and large continued following the warrant-presumption model, even resisting several opportunities to apply a balancing approach. While the lower courts have commonly applied the balancing model and ruled in favor of the prosecution in cases similar to the three Supreme Court precedents, they have generally been hesitant to extend the model to other contexts, and at times have explicitly refused to interpret the trilogy expansively. Nevertheless, even though the model has not yet managed to make substantial inroads in undermining Fourth Amendment protections, most of the defendant-friendly lower court opinions generated dissents or disagreements with other courts, confirming the criticisms of the balancing approach as subjective and malleable. Moreover, the cases that found the balancing test favored the defendant were, or could have been, resolved under the warrant-presumption model as well. The uncertainty surrounding both when a balancing analysis is appropriate and how the competing interests should be weighed therefore supports continued adherence to the warrant-presumption model and exclusion of evidence uncovered during warrantless searches that are not justified by a warrant exception.

A. Subsequent Supreme Court Opinions

Despite academics' concerns about the continued viability of the warrant-presumption model, the Court has continued to follow that model in Fourth Amendment cases decided since the three reasonableness-balancing model decisions.²⁷⁴ Although the Court has

273. See *supra* note 33 and accompanying text.

274. See *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2533–34 (2019) (plurality opinion); *id.* at 2539–40 (Thomas, J., concurring in the judgment); *id.* at

still declined to offer any explanation or justification for its choice of model in a particular case, no majority opinion issued in the seven years since *Maryland v. King* has used the balancing approach to evaluate the constitutionality of a Fourth Amendment intrusion outside the special needs context.

In fact, the majority in *Rodriguez v. United States* ignored the three dissenters' plea to "adhere to the reasonableness requirement"²⁷⁵ and apply the two-step approach Justice Scalia laid out in *Wyoming v. Houghton*.²⁷⁶ Instead, the Court held that a traffic stop may not be extended "'beyond the time reasonably required to complete th[e] mission' of issuing a warning ticket," rejecting the dissent's balancing-type argument that the substantial government interest in drug interdiction "offset[]" the "*de minimis*" intrusion occasioned by the short delay required to enable a drug detection dog to sniff Rodriguez's vehicle.²⁷⁷

In addition, while language mirroring the "touchstone" mantra has featured in six majority opinions that postdate *Maryland v. King*, none of them applied the reasonableness-balancing model. In the first, *Fernandez v. California*, the Court simply used the "touchstone" phrase in the way it was first utilized in *Brigham City v. Stuart*²⁷⁸—to explain the warrant-presumption model. Although a warrant is "generally required" to search a home, the Court pointed out in *Fernandez*, "the ultimate touchstone of the Fourth Amendment is reasonableness" and therefore "certain categories of permissible warrantless searches have long been recognized."²⁷⁹

The Court repeated that sentiment in *Riley v. California*²⁸⁰ but then went on to rely on *Houghton* in noting that, "[a]bsent more precise guidance from the founding era," the Justices "generally" decide

2543 (Sotomayor, J., dissenting); *City of Los Angeles v. Patel*, 576 U.S. 409, 419 (2015); *Fernandez v. California*, 571 U.S. 292, 298 (2014). For additional cases, see *supra* note 64 and accompanying text.

275. *Rodriguez v. United States*, 575 U.S. 348, 361 (2015) (Thomas, J., dissenting).

276. See *id.* at 359. For discussion of *Houghton*'s approach, see *supra* notes 130–138 and accompanying text.

277. *Rodriguez*, 575 U.S. at 350–51, 356 (first alteration in original) (quoting *Illinois v. Caballes*, 543 U.S. 405, 407 (2005)).

278. *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006); see also *supra* notes 206–208 and accompanying text.

279. *Fernandez*, 571 U.S. at 298 (internal quotation marks omitted) (quoting *Stuart*, 547 U.S. at 403) (discussing the consent search exception).

280. *Riley v. California*, 573 U.S. 373, 381–82 (2014).

whether a warrant is required by using a balancing analysis.²⁸¹ Although Chief Justice Roberts's majority opinion discussed the competing governmental and individual privacy interests in deciding that police may not search the data on a cell phone as part of a search incident to arrest,²⁸² this case fits more closely in the warrant-presumption model camp. Mirroring the balancing test used in *Terry* to justify creating the stop-and-frisk exception to the warrant requirement,²⁸³ *Riley* observed that the "balancing of interests supported the search incident to arrest exception," and the Court's discussion of the government's side of the balance focused on the specific "rationales" underlying that warrant exception: protecting officers and preserving evidence.²⁸⁴ Aside from the reference to *Houghton*, therefore, *Riley* reads like a standard warrant-presumption model opinion analyzing the permissible scope of what the Court called the "categorical rule" allowing warrantless searches incident to arrest.²⁸⁵

Birchfield v. North Dakota, which held that law enforcement officials may administer breathalyzer but not blood tests incident to the arrest of a DUI suspect, relied on *Riley*, but was even clearer in endorsing the warrant-presumption model.²⁸⁶ Justice Alito's majority opinion in *Birchfield* did note that the language of the Fourth Amendment makes reasonableness "the ultimate measure" of the validity of a search, but the Court was explaining the warrant-presumption model there.²⁸⁷

The opinion went on to discuss the "individual privacy interests" burdened by breath and blood tests,²⁸⁸ and to compare blood alcohol tests to the DNA testing approved in *Maryland v. King*.²⁸⁹ But, like

281. *Id.* at 385 (citing *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

282. *See id.* at 385–98.

283. *Terry v. Ohio*, 392 U.S. 1, 10–15 (1968); *see also supra* notes 97–100 and accompanying text.

284. *Riley*, 573 U.S. at 386.

285. *Id.*; *cf.* *Chimel v. California*, 395 U.S. 752, 763 (1969) (refusing to allow a search incident to arrest to extend beyond "the area 'within [the arrestee's] immediate control'").

286. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2184, 2176, 2173 (2016).

287. *Id.* at 2173 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995)) (acknowledging the "usual requirement" of a warrant, "subject to a number of exceptions").

288. *Id.* at 2176.

289. *See id.* at 2177 (citing *Maryland v. King*, 569 U.S. 435, 446, 461–65 (2013)). Interestingly, the Court noted that *King* "contrast[ed] sharply" with *Birchfield* because breathalyzers "reveal[] only one bit of information" and leave nothing "in the possession of the police," whereas DNA cheek swabs give the government "possession of . . . a sample from which a wealth of

Riley, *Birchfield* reads like a straightforward warrant-presumption model decision assessing the scope of searches incident to arrest. In fact, the Court decided the case on a search-incident-to-arrest rationale even though the court below had applied the reasonableness-balancing model.²⁹⁰ Moreover, Justice Alito chided the dissenters for misciting Supreme Court precedent that called for using a balancing approach in deciding “whether the public interest demands *creation*” of a new categorical warrant exception and “*not*” in “apply[ing] an existing exception.”²⁹¹ *Riley*, the *Birchfield* Court emphasized, mandated a balancing analysis when evaluating the reasonableness of a “*category*” of warrantless searches—searches incident to arrest—whereas the “*applicability*” of the search-incident-to-arrest exception does not “turn[] on case-specific variables.”²⁹² Thus, *Birchfield*, like *Riley*, followed in the footsteps of *Terry* and approved of using a balancing test within the confines of the warrant-presumption model in creating and determining the reach of the categorical warrant exceptions.²⁹³

The final three post-*King* opinions to repeat the “touchstone” mantra likewise did so within the framework of the warrant-presumption model. As in some of its earlier decisions,²⁹⁴ the majority in *Heien v. North Carolina* used the “touchstone” language to support the notion that reasonableness “allows for some mistakes on the part of

additional, highly personal information could potentially be obtained.” *Id.* Although Justice Alito added the qualification that King’s DNA sample “could lawfully be used only for identification purposes” under the Maryland statute at issue there, *id.*, *Birchfield*’s description of the intrusiveness of DNA testing seems at odds with the *King* Court’s reasoning. See *supra* note 87 and accompanying text.

290. See *State v. Birchfield*, 858 N.W.2d 302, 309–10 (N.D. 2015), *rev’d*, 136 S. Ct. 2160 (2016); see also Brief for the United States as Amicus Curiae Supporting Respondents at 31–36, *Birchfield*, 136 S. Ct. 2160 (2016) (No. 14–1468), 2016 WL 4177088, at *31–36 (relying on *Maryland v. King*’s balancing approach). The state supreme court’s opinion in *Birchfield* is discussed *infra* note 478.

291. *Birchfield*, 136 S. Ct. at 2180 (emphasis in original) (quoting *Camara v. Mun. Ct.*, 387 U.S. 523, 533 (1967)).

292. *Id.* at 2185 n.8, 2180 (emphasis added).

293. Similarly, in *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2533–34 (2019) (plurality opinion), the Justices—without mentioning the reasonableness model or balancing tests—used the warrant-presumption model in analyzing whether warrantless blood testing of unconscious drivers in DUI cases falls within the exigent circumstances exception. See also *id.* at 2539–40 (Thomas, J., concurring in the judgment); *id.* at 2543 (Sotomayor, J., dissenting).

294. See *supra* notes 187–188 and accompanying text.

governmental officials.”²⁹⁵ *County of Los Angeles v. Mendez* quoted the “touchstone” phrase in applying the totality-of-the-circumstances test long used by the Court in evaluating excessive force claims.²⁹⁶ And *Kansas v. Glover* cited the phrase in concluding that reasonable suspicion justified the traffic stop in that case.²⁹⁷

The only recent Supreme Court opinion that arguably endorsed the reasonableness-balancing model is the unanimous per curiam opinion in *Grady v. North Carolina*, which held that requiring a recidivist sex offender to wear a tracking device constituted a search for Fourth Amendment purposes.²⁹⁸ Although the Court remanded the case to the state courts to assess the constitutionality of the search, it noted that “[t]he Fourth Amendment prohibits only *unreasonable* searches.”²⁹⁹ *Grady* then went on to observe that the reasonableness of a search turns on all of the circumstances, “including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations.”³⁰⁰ Although, as discussed above, a totality-of-the-circumstances analysis does not necessarily trigger a balancing test³⁰¹ and reading too much into dictum in a per curiam opinion seems risky, the Court cited both *Samson* and the special needs ruling in *Vernonia School District 47J v. Acton* following that statement.³⁰²

With the exception of *Grady*’s dictum and *Riley*’s reference to *Houghton*, the Supreme Court cases decided since the trilogy of reasonableness-balancing model opinions have adhered to the warrant-presumption approach, thus suggesting that that model is still alive and well. The Court even declined the opportunity to use the balancing model in *Rodriguez* and *Birchfield*, and the *Birchfield* majority emphasized the appropriateness of using a balancing test in deciding

295. *Heien v. North Carolina*, 574 U.S. 54, 60–61 (2014) (holding that reasonable suspicion can exist despite a police officer’s reasonable mistake of law). For criticism of the ruling in *Heien*, see Kit Kinports, *Heien’s Mistake of Law*, 68 ALA. L. REV. 121 (2016).

296. *County of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1546 (2017). For discussion of the Court’s excessive force jurisprudence, see *supra* notes 111–114 and accompanying text.

297. *Kansas v. Glover*, 140 S. Ct. 1183, 1191 (2020).

298. *Grady v. North Carolina*, 575 U.S. 306, 307, 309–10 (2015) (per curiam).

299. *Id.* at 310 (emphasis in original).

300. *Id.*

301. See *supra* notes 113–114 and accompanying text.

302. See *Grady*, 575 U.S. at 310 (citing *Samson v. California*, 547 U.S. 843 (2006); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995)). For lower court opinions applying *Grady*, see *infra* notes 371–395 and accompanying text.

whether to create a warrant exception but not in applying that exception to the facts of a given case (at least in the context of searches incident to arrest). The Section that follows continues to explore the legacy of the reasonableness-balancing model by analyzing the lower court case law applying the Supreme Court's trilogy.

B. Subsequent Lower Court Opinions

A survey of the lower courts' reaction to *Knights*, *Samson*, and *King*³⁰³ reveals that the clear majority of citations to the Supreme Court's reasonableness-balancing model trilogy are unremarkable. A substantial number of federal court of appeals opinions simply referenced the Court's three decisions in introducing the warrant-presumption model,³⁰⁴ much as the Court itself has done on several occasions,³⁰⁵ or in applying the warrant-presumption model.³⁰⁶ Not surprisingly, other federal appellate court opinions relied on the Supreme Court precedents in allowing searches of probationers and parolees.³⁰⁷ And while a few federal courts used the special needs rubric

303. In evaluating the impact that the reasonableness-balancing model has had on the lower courts, I Shepardized *Knights*, *Samson*, and *King*, looking at opinions issued by the federal courts of appeals and the state supreme courts through June 30, 2020.

304. See, e.g., *United States v. Owens*, 917 F.3d 26, 35 (1st Cir. 2019); *United States v. Sanders*, 712 F. App'x 956, 958 (11th Cir. 2017) (per curiam); *United States v. Golson*, 743 F.3d 44, 50–51 (3d Cir. 2014); *United States v. Barner*, 666 F.3d 79, 83 (2d Cir. 2012); *United States v. Lemus*, 582 F.3d 958, 961 (9th Cir. 2009).

305. See *supra* notes 206–208, 278–279 and accompanying text.

306. See, e.g., *United States v. Richmond*, 915 F.3d 352, 359–60 (5th Cir. 2019) (automobile exception); *United States v. Lyles*, 910 F.3d 787, 796 (4th Cir. 2018) (overly broad warrant); *United States v. Lichtenberger*, 786 F.3d 478, 487–88 (6th Cir. 2015) (private search doctrine); *United States v. Bailey*, 743 F.3d 322, 331–32 (2d Cir. 2014) (stop and frisk); *United States v. Cotterman*, 709 F.3d 952, 960–68 (9th Cir. 2013) (en banc) (administrative search); *Bernini v. City of Saint Paul*, 665 F.3d 997, 1003 (8th Cir. 2012) (probable cause); *Elec. Priv. Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 653 F.3d 1, 10 (D.C. Cir. 2011) (administrative search); *United States v. Schlatter*, 411 F. App'x 896, 898–99 (7th Cir. 2011) (stop and frisk); *Mollo v. Passaic Valley Sewerage Comm'n*, 406 F. App'x 664, 668–69 (3d Cir. 2011) (administrative search); *United States v. Uscanga-Ramirez*, 475 F.3d 1024, 1029 (8th Cir. 2007) (consent and exigent circumstances); *United States v. Jimenez*, 419 F.3d 34, 41 (1st Cir. 2005) (protective sweep); *United States v. Chanthasouxat*, 342 F.3d 1271, 1275 (11th Cir. 2003) (reasonable suspicion), *overruled on other grounds by* *Heien v. North Carolina*, 574 U.S. 54, 61 (2014).

307. See, e.g., *United States v. Lambus*, 897 F.3d 368, 402–03 (2d Cir. 2018); *United States v. Johnson*, 875 F.3d 1265, 1273–76 (9th Cir. 2017); *United States v. Jackson*, 866 F.3d 982, 984–85 (8th Cir. 2017); *United States v.*

to analyze the permissibility of DNA collection,³⁰⁸ most of them anticipated *Maryland v. King's* reliance on the balancing model in upholding DNA testing.³⁰⁹

The pattern in the state supreme courts is similar, with some courts citing the reasonableness-balancing model precedents in introducing³¹⁰ or applying³¹¹ the warrant-presumption model, in permitting searches of probationers and parolees,³¹² and in allowing DNA testing prior to

Doxey, 833 F.3d 692, 703–06 (6th Cir. 2016); *United States v. White*, 781 F.3d 858, 861–64 (7th Cir. 2015). For federal cases with similar facts balancing in favor of the defendant, see *infra* notes 347, 352–357 and accompanying text.

308. See *United States v. Mitchell*, 652 F.3d 387, 402–03 n.15 (3d Cir. 2011) (en banc) (citing *United States v. Amerson*, 483 F.3d 73, 78 (2d Cir. 2007); *United States v. Hook*, 471 F.3d 766, 773 (7th Cir. 2006); *Green v. Berge*, 354 F.3d 675, 677–78 (7th Cir. 2004)).

309. See, e.g., *id.* at 402–03; *United States v. Stewart*, 532 F.3d 32, 34–36 (1st Cir. 2008); *Wilson v. Collins*, 517 F.3d 421, 424–27 (6th Cir. 2008); *Banks v. United States*, 490 F.3d 1178, 1183–84 (10th Cir. 2007); *United States v. Kraklio*, 451 F.3d 922, 923–25 (8th Cir. 2006); *United States v. Kincade*, 379 F.3d 813, 830–32 (9th Cir. 2004) (en banc). For federal cases using the balancing test to invalidate DNA testing, see *infra* notes 362–369 and accompanying text.

310. See, e.g., *People v. Brunsting*, 307 P.3d 1073, 1078–79 (Colo. 2013); *Shotts v. State*, 925 N.E.2d 719, 723 (Ind. 2010); *State v. Thompson*, 886 N.W.2d 224, 228 (Minn. 2016); *State v. Waldrup*, 331 S.W.3d 668, 672 (Mo. 2011); *State v. Gathers*, 190 A.3d 409, 415 (N.J. 2018); *People v. Molnar*, 774 N.E.2d 738, 739–40 (N.Y. 2002); *Commonwealth v. Jacoby*, 170 A.3d 1065, 1084 (Pa. 2017).

311. See, e.g., *In re Raymond C.*, 196 P.3d 810, 813 (Cal. 2008) (stop and frisk); *State v. Mann*, 857 A.2d 329, 339 (Conn. 2004) (frisk); *State v. Doe*, 233 P.3d 1275, 1280 (Idaho 2010) (administrative search); *People v. Oliver*, 925 N.E.2d 1107, 1112–13 (Ill. 2010) (stop); *State v. Tyler*, 830 N.W.2d 288, 293–94 (Iowa 2013) (probable cause); *State v. Watts*, 126 A.3d 1216, 1223 (N.J. 2015) (detention during execution of search warrant); *State v. Hathaway*, 120 A.3d 155, 168 (N.J. 2015) (emergency aid search); *People v. Garvin*, 88 N.E.3d 319, 328–29 (N.Y. 2017) (consent); *State v. Hi Ti Lar*, 908 N.W.2d 181, 185–86 (S.D. 2018) (search incident to arrest); *Montague v. Commonwealth*, 684 S.E.2d 583, 587–88 (Va. 2009) (seizure); *Harris v. Commonwealth*, 668 S.E.2d 141, 145 (Va. 2008) (reasonable suspicion).

312. See, e.g., *State v. Adair*, 383 P.3d 1132, 1135–36 (Ariz. 2016); *People v. Schmitz*, 288 P.3d 1259, 1268–69 (Cal. 2012); *People v. Wilson*, 885 N.E.2d 1033, 1037 (Ill. 2008); *State v. Toliver*, 417 P.3d 253, 256 (Kan. 2018); *State v. Stenhoff*, 925 N.W.2d 429, 432–34 (N.D. 2019); *State v. Kottman*, 707 N.W.2d 114, 118–21 (S.D. 2005); *State v. Hamm*, 589 S.W.3d 765, 773–77 (Tenn. 2019); *State ex rel. A.C.C.*, 44 P.3d 708, 711–14 (Utah 2002); *State v. Kane*, 169 A.3d 762, 772–74 (Vt. 2017); *State v. Purtell*, 851 N.W.2d 417, 424–26 (Wis. 2014). For state cases balancing in favor of probationers and parolees, see *infra* notes 345–347, 349–351 and accompanying text.

Maryland v. King.³¹³ Again, however, other state courts used the special needs framework to analyze the constitutionality of DNA collection.³¹⁴

Aside from these decisions, the record in the lower courts is mixed. Some courts have been reserved in applying the three Supreme Court opinions, refusing to engage in a balancing analysis, requiring the prosecution to satisfy both models, or weighing the competing interests in favor of the defendant. On the other hand, there are a few discrete areas in which the lower courts have arguably used the Supreme Court precedent more aggressively, expanding the contexts in which the balancing model surfaces. Even here, however, the cases are few in number and not always transparent in their rationale, and, with the exception of those involving foreign intelligence and national security searches, it is not obvious how much they have departed from the warrant-presumption model and extended the reach of the balancing model. The rest of this Section explores each of these topics in turn, concluding with an assessment of why the Court created the balancing model and what its future holds, and suggesting that, although the Supreme Court's trilogy has not had much of an impact on Fourth Amendment case law, the amorphousness and pliability of the balancing approach suggest that courts should continue to follow the warrant-presumption model and suppress evidence discovered during warrantless searches that do not fall within a categorical warrant exception.

1. Refusing to Balance

Several state supreme courts, interpreting their own state constitutions, have refused to follow the Supreme Court's reasonableness-balancing model precedents. In *State v. Short*, a majority of the Iowa Supreme Court interpreted the state constitution to reject the approach taken in *Knights* and *Samson* and instead to require law enforcement officials to obtain a warrant before searching the home of a probationer or parolee.³¹⁵ The court was critical of the

313. See, e.g., *Mario W. v. Kaipio*, 281 P.3d 476, 480–82 (Ariz. 2012); *People v. Robinson*, 224 P.3d 55, 65 (Cal. 2010); *People v. Lakisha M. (In re Lakisha M.)*, 882 N.E.2d 570, 573–81 (Ill. 2008); *State v. Hutchinson*, 969 A.2d 923, 930–31 (Me. 2009); *State v. Raines*, 857 A.2d 19, 27 (Md. 2004); *In re M.L.M.*, 813 N.W.2d 26, 28 (Minn. 2012); *State v. Johnson*, 813 N.W.2d 1, 2–3 (Minn. 2012); *State v. Sanders*, 163 P.3d 607, 611–12 (Or. 2007); *Segundo v. State*, 270 S.W.3d 79, 97–99 (Tex. Crim. App. 2008). For state cases using the balancing test to invalidate DNA testing, see *infra* note 370 and accompanying text.

314. See *Kincade*, 379 F.3d at 830 (citing five state court decisions).

315. *State v. Short*, 851 N.W.2d 474, 506 (Iowa 2014). But see *id.* at 507 (Waterman, J., dissenting) (advocating that the court follow *Knights*); *id.* at 520 (Mansfield, J., dissenting) (same).

reasonableness-balancing model, describing it as a “newly fashioned . . . doctrine” that relies on “slippery reasoning” and enables the Justices to circumvent the warrant requirement “whenever a majority . . . determines that it is ‘reasonable’ to do so.”³¹⁶ Pointing out that judges “can come up with ingenious explanations of how just about any search is reasonable,” the Iowa court had “little interest” in permitting the reasonableness clause of the state constitution to act as “a generalized trump card” to “override the warrant clause” in cases involving home searches.³¹⁷

The Hawaii Supreme Court rejected the reasonableness-balancing model outright in *State v. Yong Shik Won*, reasoning that the state constitution does not countenance “an indeterminate balancing test” but instead requires a warrant or a warrant exception “rooted in our law.”³¹⁸ The court therefore concluded that the lower court had erred in relying on *Maryland v. King* and characterizing reasonableness as “the ultimate measure of the constitutionality” of a search.³¹⁹

In *State v. Kane*, the Vermont Supreme Court similarly indicated that it had declined to adopt “the federal balancing test” under its state constitution and therefore required proof of a “‘special need’” to “justif[y] departing from the warrant and probable cause requirement.”³²⁰ Consistent with that view, the Vermont court’s opinion in *State v. Medina* was critical of the approach taken in *Maryland v. King* and instead used the special needs rubric in striking down a state

316. *Id.* at 497, 502 (majority opinion).

317. *Id.* at 501–02; *see also* *State v. Ingram*, 914 N.W.2d 794, 804 (Iowa 2018) (noting, in rejecting the Supreme Court’s approach to automobile inventory searches, that the reasonableness-balancing model is a “revisionist trend” that relies on a “new innovative touchstone” to create “a free-floating and open-ended concept of ‘reasonableness’ . . . unhinged from the warrant requirement”); *cf.* *State v. King*, 867 N.W.2d 106, 115 n.5 (Iowa 2015) (applying the special needs exception rather than the balancing model in evaluating the permissibility under the state constitution of a parole officer’s search of a parolee’s home).

318. *State v. Yong Shik Won*, 372 P.3d 1065, 1085 (Haw. 2015).

319. *Id.* (quoting *State v. Yong Shik Won*, 332 P.3d 661, 679 (Haw. Ct. App. 2014), *rev’d*, 372 P.3d 1065 (Haw. 2015)). The state supreme court also rejected the argument that the consent search exception allowed police to administer a breathalyzer test to a DUI arrestee who was told that refusing the test would lead to criminal charges. *See id.* at 1081–84.

320. *State v. Kane*, 169 A.3d 762, 775 (Vt. 2017) (internal quotation marks omitted in original) (quoting *State v. Bogert*, 109 A.3d 883, 889 (Vt. 2014)) (upholding a probation condition requiring electronic monitoring).

statute that authorized DNA testing of any felony suspect following a judicial determination of probable cause.³²¹

Other state court opinions have refused to apply the reasonableness-balancing model in interpreting the reach of the Fourth Amendment. In *State v. Ryce*, the Kansas Supreme Court declined to play “the wild card of general reasonableness” in a case contesting the constitutionality of a statute that criminalized a DUI arrestee’s refusal to consent to a BAC test.³²² Noting that the Supreme Court has “often repeated” the language endorsing the warrant-presumption model, the Kansas court quoted *Illinois v. McArthur* in explaining that “general reasonableness applies in limited circumstances, such as ‘[w]hen faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like.’”³²³ Finding no special need, reduced expectation of privacy, or de minimis intrusion in that case, the court concluded (without acknowledging *Maryland v. King* here) that “[g]eneral reasonableness—untethered from the special needs exception—is not a recognized warrant exception in a criminal context.”³²⁴

In a similar case, *State v. Villarreal*, a divided Texas Court of Criminal Appeals declined to apply the reasonableness-balancing test in assessing the constitutionality of a state statute permitting warrantless, nonconsensual blood draws following certain DWI arrests.³²⁵ After rejecting the prosecution’s reliance on several warrant

321. *State v. Medina*, 102 A.3d 661, 668, 674–79 (Vt. 2014); *see also State v. O’Hagen*, 914 A.2d 267, 277 (N.J. 2007) (using the special needs framework rather than a balancing test to assess the permissibility of DNA testing in a pre-*King* case, noting that “[t]he more stringent special needs analysis provides an appropriate framework for evaluating defendant’s . . . state constitutional claims”).

322. *State v. Ryce*, 368 P.3d 342, 375 (Kan. 2016) (internal quotation marks omitted) (quoting *State v. Baughman*, 32 P.3d 199, 201 (Kan. Ct. App. 2001)). For further discussion of the constitutionality of implied consent statutes, *see infra* notes 478–480 and accompanying text.

323. *Ryce*, 368 P.3d at 375 (alteration in original) (quoting *Illinois v. McArthur*, 531 U.S. 326, 330 (2001)). For further discussion of *McArthur*’s language, *see supra* notes 159–162 and accompanying text.

324. *Ryce*, 368 P.3d at 375. The court also rejected the argument that the BAC test could be justified as a consensual, *see id.* at 363–64, 369, or special needs search, *see id.* at 366–67.

325. *State v. Villarreal*, 475 S.W.3d 784, 794, 808–10 (Tex. Crim. App. 2014) (evaluating a statute that allowed blood tests where arrests involved aggravating circumstances, such as fatal accidents or drivers with at least two prior DWI convictions). *But see id.* at 815–16 (Keller, P.J., dissenting) (applying the Supreme Court’s totality-of-the-circumstances balancing test).

exceptions,³²⁶ the majority dismissed the State's "alternative" argument based on *Maryland v. King* that "a balancing test is appropriate given the context."³²⁷ Rather, the court admonished, "[t]he Supreme Court has made clear" that an "established [warrant] exception" is required when law enforcement's "primary goal" is "gathering . . . evidence" in "an active criminal investigation," and the court refused to ignore "this well-established principle in favor of a more generalized balancing-of-interests test."³²⁸ Unlike the Kansas Supreme Court in *Ryce*, the Texas court addressed *Maryland v. King*, but found that case distinguishable, ultimately declining to give *King* a "broad reading" that would allow judges to perform a balancing test in evaluating the permissibility of "an investigative search."³²⁹

In addition to these state court opinions, a plurality of the en banc D.C. Circuit expressly refused to use the reasonableness-balancing model in *United States v. Askew*, rejecting the Government's argument that unzipping the defendant's jacket to enable a robbery victim to better see the rest of his clothing was "a reasonable, *de minimis* investigative measure that appropriately facilitated the show-up procedure."³³⁰ The Supreme Court had already balanced the relevant interests in the stop-and-frisk line of cases, the plurality responded, and no precedent allowed the police to continue searching a suspect based only on reasonable suspicion when a frisk had not uncovered a weapon.³³¹ Therefore, the plurality concluded, lower courts were "not free to reweigh the interests at issue" to create "a wholly new investigative identification search exception to the warrant . . .

326. *See id.* at 798 (majority opinion) (rejecting the exceptions for consent searches, automobile searches, special needs searches, and searches incident to arrest).

327. *Id.* at 808.

328. *Id.* at 808–09.

329. *Id.* at 810; *see also id.* at 809–10 (distinguishing *King* as involving a "routine administrative procedure[]" that afforded "no discretion" to law enforcement officials and created only a "minimal . . . intrusion beyond what a DWI arrestee would otherwise experience"). For contrary DUI cases, *see infra* note 478 and accompanying text. For further discussion of *Villarreal*, *see infra* note 479.

330. *United States v. Askew*, 529 F.3d 1119, 1126 (D.C. Cir. 2008) (en banc) (plurality opinion) (quoting the Government's en banc brief). Another part of this opinion, which was joined by a majority of the judges, concluded that the search could not be justified under *Terry* because it was not part of the frisk and was not supported by reasonable suspicion. *See id.* at 1140–44 (majority opinion).

331. *See id.* at 1127 (plurality opinion).

requirement[].”³³² *Askew* arose before *Maryland v. King*, but the plurality distinguished *Knights* as a case involving an individual who had a reduced “expectation of privacy as a result of governmental supervision.”³³³

These cases are relatively few in number, and all of them generated disagreement among the judges themselves or with other courts. Nevertheless, they are illustrations of courts unwilling to discard the warrant-presumption model and engage in a balancing analysis, at times even in contexts similar to the Court’s trilogy of balancing model opinions.

2. Requiring Compliance with Both Models

Interestingly, a handful of lower courts have interpreted the Supreme Court’s reasonableness-balancing model opinions to suggest that the Fourth Amendment requires the prosecution to satisfy *both* the warrant-presumption model and the reasonableness-balancing model. In two cases involving invasive strip searches of arrestees,³³⁴ for example, the Ninth Circuit and the D.C. Court of Appeals adopted that view, relying on the Supreme Court’s statement in *Maryland v. King* that, “[e]ven if a warrant is not required, a search is not beyond Fourth Amendment scrutiny[,] for it must be reasonable in its scope and manner of execution.”³³⁵ Although the Justices made this observation in the context of announcing that they were going to apply the reasonableness-balancing model rather than the warrant-presumption model to resolve the question before them in *King*,³³⁶ the two lower courts used the statement to justify skipping over the question whether a warrant exception applied and invalidating the strip searches under the balancing test.³³⁷ In the words of the Ninth Circuit, “we need not and do not determine” if a warrant was necessary to strip search the arrestee because the officers’ actions were “unreasonable for other

332. *Id.* at 1127, 1134.

333. *Id.* at 1135.

334. *See* *United States v. Fowlkes*, 804 F.3d 954, 959 (9th Cir. 2015) (police officer “forcibly ‘retrieved’” a plastic bag from the defendant’s rectum “without the assistance of anesthesia, lubricant, or medical dilation”); *Akinmboni v. United States*, 126 A.3d 694, 696–97 (D.C. 2015) (deputy marshal ordered the defendant to remove several plastic baggies “from [his] anal cavity” without “seek[ing] the assistance of trained medical personnel”).

335. *Fowlkes*, 804 F.3d at 962 (first alteration in original) (quoting *Maryland v. King*, 569 U.S. 435, 448 (2013)); *see also Akinmboni*, 126 A.3d at 697–98 (quoting the same language from *King*).

336. *See King*, 569 U.S. at 448; *see also supra* note 80 and accompanying text.

337. *See Fowlkes*, 804 F.3d at 962; *Akinmboni*, 126 A.3d at 697–98.

reasons.”³³⁸ The D.C. court similarly reasoned that it “need not address” the prosecution’s reliance on the plain view and search-incident-to-arrest exceptions given the court’s conclusion that it was unreasonable to perform the search without the assistance of trained medical personnel.³³⁹

In *Palacios v. Burge*, a case predating *Maryland v. King*, the Second Circuit adopted a similar approach in reliance on *Samson*.³⁴⁰ After determining that exigency justified a warrantless show-up outside a club where two people had just been stabbed, the court went on to quote *Samson* and caution that “[f]inding exigent circumstances . . . does not alone” conclude the constitutional inquiry because “[w]e must still examine” if the show-up was “reasonable, which remains the ‘touchstone of the Fourth Amendment.’”³⁴¹ Although the Second Circuit ultimately weighed the competing interests in favor of the Government,³⁴² the view that the prosecution must satisfy the reasonableness-balancing model as well as the warrant-presumption model is certainly a defendant-friendly interpretation of the Supreme Court’s balancing model opinions.³⁴³

3. Balancing in Favor of the Defendant

Even when the lower courts rely solely on the reasonableness-balancing model, their use of that approach does not, unlike in the Supreme Court, invariably signal a victory for the prosecution. In cases that have arisen in circumstances similar to the Supreme Court’s trilogy, the lower courts have generally weighed the competing interests in favor of the government.³⁴⁴ Nevertheless, even here there are exceptions. And some lower court opinions, while extending the balancing approach to other contexts, have ultimately ruled for the defendant. This Section first discusses the cases factually similar to the Supreme Court’s precedents and then turns to those that have expanded the balancing model to other types of law enforcement intrusions.

338. *Fowlkes*, 804 F.3d at 962. *But see id.* at 976 (Restani, J., dissenting in part) (arguing that the search was reasonable under the totality-of-the-circumstances balancing test).

339. *Akinmboni*, 126 A.3d at 697.

340. *Palacios v. Burge*, 589 F.3d 556, 563 (2d Cir. 2009).

341. *Id.* (quoting *Samson v. California*, 547 U.S. 843, 855 n.4 (2006)).

342. *See id.* at 565–66. For further discussion of this case, see *infra* notes 457–466 and accompanying text.

343. For other lower court opinions arguably following this approach, see *infra* notes 430, 467–477 and accompanying text.

344. *See supra* notes 307–309, 312–314 and accompanying text.

a. Searches of Parolees and Probationers

In *Jones v. State*, the Georgia Supreme Court distinguished *Knights* and refused to allow the warrantless search of a probationer's home absent some "law, legally authorized regulation, or sentencing order" that gave him "notice" he had a reduced expectation of privacy.³⁴⁵ Reasoning that "notice is a critical consideration" in measuring reasonable expectations of privacy, the court concluded that the defendant's "status as a probationer, standing alone, cannot serve as a substitute for a search warrant."³⁴⁶ Although some courts have agreed with the Georgia Supreme Court,³⁴⁷ others have refused to read *Knights* and *Samson* as requiring an explicit search condition.³⁴⁸

In *Commonwealth v. Moore*, the Massachusetts Supreme Judicial Court applied a balancing test in holding under its own state constitution that searches of parolees' homes require reasonable suspicion.³⁴⁹ Although the court found that the State's "supervisory

345. *Jones v. State*, 653 S.E.2d 456, 458 (Ga. 2007).

346. *Id.* at 459.

347. *See, e.g.*, *United States v. Henley*, 941 F.3d 646, 650–51 (3d Cir. 2019) (requiring notice to justify a suspicionless search of a parolee's home); *United States v. Hill*, 776 F.3d 243, 249 (4th Cir. 2015) (describing the search condition as "critical" to the outcome in *Knights* and *Samson*, and therefore requiring probable cause to search a probationer's home in the absence of a search condition); *United States v. Freeman*, 479 F.3d 743, 748 (10th Cir. 2007) (striking down the search of a parolee's home on the grounds that it "exceeded [his] reasonable expectations" because the search condition he signed covered only searches by parole officers and state regulations required them to have reasonable suspicion to search); *State v. Vanderkolk*, 32 N.E.3d 775, 777–78 (Ind. 2015) (rejecting the argument that *Samson* "authorize[d] suspicionless searches based on a parolee's status alone," and distinguishing *Knights* because the search condition required probable cause to search Vanderkolk's home); *cf.* *State v. Ryce*, 368 P.3d 342, 365 (Kan. 2016) (distinguishing *Samson* on the grounds that drivers do not have a reduced expectation of privacy and "do not necessarily have express notice" that driving constitutes implied consent to DUI testing, in the context of rejecting the argument that such tests fall within the consent search exception).

348. *See, e.g.*, *United States v. Caya*, 956 F.3d 498, 503 (7th Cir. 2020) (upholding a state statute authorizing searches of offenders on supervised release based on reasonable suspicion, and noting that neither *Knights* nor *Samson* "rested on a consent rationale, either express or implied"); *United States v. Keith*, 375 F.3d 346, 350 (5th Cir. 2004) (maintaining that the "core reasoning" of *Knights* was to "explain[] why the needs of the probation system outweigh the privacy rights of the probationers generally," and finding a diminished expectation of privacy there—despite the absence of a search condition—because courts in that state had "consistently" allowed searches of probationers' homes supported by only reasonable suspicion).

349. *Commonwealth v. Moore*, 43 N.E.3d 294, 300 (Mass. 2016).

interests” outweighed a parolee’s reduced expectation of privacy, the court disagreed with *Samson* and concluded that a reasonable suspicion requirement constituted “an important safeguard against unfettered police authority.”³⁵⁰ Moreover, the court held that the parole board could not circumvent its ruling by imposing a search condition on a particular parolee that authorized suspicionless searches.³⁵¹

In *United States v. Scott*, a case that arose in the analogous context of pretrial release, a divided panel of the Ninth Circuit determined that a random drug testing condition did not survive the balancing test and therefore required probable cause.³⁵² After rejecting the Government’s arguments that the search condition could be justified as either a consent search or a special needs search,³⁵³ the court applied “a more general ‘totality of the circumstances’ approach.”³⁵⁴ The case predated *Maryland v. King*, and the majority distinguished *Knights* on the grounds that the defendant had “merely” been “accused of a crime” and was “still presumed innocent.”³⁵⁵ The Ninth Circuit also rejected “the assumption” that pretrial releasees were more likely to commit additional crimes compared to the general public “without an individualized determination to that effect.”³⁵⁶ Finally, the court reasoned that the Government had no interest in “integrating” an arrestee, “who ha[d] never left the community, back into the community,” and therefore the law enforcement interests in “surveillance and control” were “considerably less” for pretrial releasees than for probationers.³⁵⁷

In a similar case decided after *Maryland v. King*, however, the Montana Supreme Court reached a contrary conclusion. In that case, *State v. Spady*, the Montana court applied the reasonableness-balancing model in upholding a state statute that authorized judges to require twice-a-day breathalyzer tests as a condition of pretrial release for those arrested for second or subsequent DUI offenses.³⁵⁸ Relying on *King*, the court applied what it called “the diminished expectation of privacy

350. *Id.* at 300, 304.

351. *See id.* at 300 n.6.

352. *United States v. Scott*, 450 F.3d 863, 874 (9th Cir. 2006). *But see id.* at 889 (Bybee, J., dissenting) (arguing that the balancing test required only reasonable suspicion).

353. *See id.* at 865–72 (majority opinion).

354. *Id.* at 872.

355. *Id.* at 873.

356. *Id.* at 874.

357. *Id.*

358. *State v. Spady*, 354 P.3d 590, 598 (Mont. 2015).

exception” in concluding that the State’s “compelling” interests outbalanced the intrusion on the defendant’s privacy.³⁵⁹ The court reasoned that the Government had “an important interest” in ensuring that “repeat DUI arrestees” do not drive under the influence, and testing them twice a day had “a strong capacity to deter” drunk driving.³⁶⁰ On the other side of the equation, the court characterized the privacy interests as “minimal” because defendants on pretrial release have a reduced expectation of privacy, the tests “involve little embarrassment or discomfort,” and they reveal no “sensitive medical information.”³⁶¹

Although the decision to rely on the reasonableness-balancing model in cases involving pretrial release is arguably an extension of the Supreme Court’s trilogy, it seems a natural outgrowth from the reasoning in *Knights* and *Samson* that conditions of release trigger a reduced expectation of privacy coupled with *King*’s argument that arrestees enjoy a diminished expectation of privacy. Notably, however, each of the lower court decisions discussed in this Section that favored the defendant encountered resistance from other judges on the panel or from other courts.

b. DNA Testing

In several cases that predated *Maryland v. King*, lower courts applied the balancing model and struck down law enforcement’s collection of a suspect’s DNA. In *United States v. Davis*, the Fourth Circuit used a balancing analysis to conclude that police violated the Fourth Amendment when they linked a suspect to a murder scene by collecting DNA from clothes that had been taken from him four years earlier in investigating a crime allegedly committed against him.³⁶² On the defendant’s side of the balance, the court acknowledged that his “privacy interest in . . . bodily integrity” was not affected by the method of DNA collection used in that case and his expectation of privacy was reduced because he was aware the police had his clothes and did not attempt to reclaim them.³⁶³ Nevertheless, the court

359. *Id.*

360. *Id.*

361. *Id.*; cf. *Castillo v. United States*, 816 F.3d 1300, 1304–05 (11th Cir. 2016) (applying the reasonableness-balancing model in upholding the search of the home of a defendant who had entered into a pretrial deferred prosecution agreement). For other cases analyzing conditions of pretrial release under the balancing model, see *infra* notes 382–386, 392–394 and accompanying text.

362. *United States v. Davis*, 690 F.3d 226, 231–32, 250 (4th Cir. 2012).

363. *Id.* at 249.

reasoned that the DNA testing took place while the defendant was “a free citizen who retained a reasonable privacy interest in his DNA sample and DNA profile.”³⁶⁴ Although the court conceded the State had “a strong and important interest” in prosecuting murder cases and “a legitimate interest” in entering additional profiles into the DNA database “to improve its efficacy as a crime-solving tool,” the court also noted that, unlike DNA testing involving no police discretion, here the officers collected the defendant’s DNA because he was suspected of being involved in a murder based on a standard of proof lower than probable cause.³⁶⁵

In *Friedman v. Boucher*, a DNA case more similar to *Maryland v. King*, a divided panel of the Ninth Circuit determined that forcibly collecting a pretrial detainee’s DNA “as an aid to solve cold cases” failed the reasonableness-balancing test.³⁶⁶ After rejecting a special needs rationale on the grounds that DNA testing involved ordinary criminal law enforcement,³⁶⁷ the court turned to the argument that “the search was ‘reasonable.’”³⁶⁸ Noting that the detainee was not suspected of being involved in any unsolved crime, the majority distinguished *Samson* on the grounds that Friedman had “successfully” “completed his term of supervised release” on a previous offense and “was no longer [under] the supervision of any authority.”³⁶⁹

And, in *King* itself, the Maryland Court of Appeals concluded by a vote of five to two that the balancing process favored the defendant, reasoning that individuals who were under arrest but not yet convicted “generally” had “a sufficiently weighty and reasonable expectation of privacy against warrantless, suspicionless” DNA collection that was not outbalanced by the State’s “purported interest” in identifying them in connection with the charges for which they had been arrested.³⁷⁰

364. *Id.*

365. *Id.* at 249–50.

366. *Friedman v. Boucher*, 580 F.3d 847, 851 (9th Cir. 2009). *But see id.* at 862–65 (Callahan, J., dissenting) (concluding that the balancing test did not favor the detainee).

367. *See id.* at 853 (majority opinion).

368. *Id.* at 856.

369. *Id.* at 858.

370. *King v. State*, 42 A.3d 549, 552 (Md. 2012), *rev’d*, 569 U.S. 435 (2013). *But see id.* at 581–87 (Barbera, J., dissenting) (concluding that the State should prevail under the balancing test). For other DNA cases in which a balancing analysis has favored defendants, see *State v. McKinney*, 730 N.W.2d 74, 85–86 (Neb. 2007) (holding that police needed probable cause to collect DNA from a defendant who had been convicted only of a misdemeanor, when the purpose of the testing was not for “databasing,” but “solely for . . . investigati[ng] . . . a particular crime”), and *State v. Medina*, 102 A.3d 661,

Although these cases have now been overshadowed by the Supreme Court's reversal of the Maryland court's decision, and, even before the Supreme Court stepped in, were outnumbered by other courts' opinions that warrantless DNA testing survived a balancing analysis, they are examples of lower courts weighing the competing interests in a more defendant-friendly manner than the Supreme Court.

c. Electronic Monitoring

In the wake of the Supreme Court's opinion in *Grady v. North Carolina*, lower courts have perhaps unsurprisingly applied the reasonableness-balancing model in cases involving electronic monitoring of criminal defendants.³⁷¹ Although this is an area of conflict among the courts, a number of them have balanced the competing interests in favor of the defendant.

In *Park v. State*, for example, the Georgia Supreme Court struck down as facially unconstitutional a state statute requiring persons designated sexually dangerous predators to wear a GPS monitoring device for the rest of their lives, at least "to the extent" that the statute allowed searching those who were "no longer serving any part of their sentences in order to find evidence of possible criminal conduct."³⁷² In addition to dismissing the State's special needs argument,³⁷³ the court considered whether the monitoring was reasonable for Fourth Amendment purposes because "the individuals being searched [had] a diminished expectation of privacy."³⁷⁴ The court thought that *Samson's* reduced expectation of privacy rationale had "no application" to

678–83 (Vt. 2014) (concluding that a state statute allowing DNA testing of any felony suspect following a judicial determination of probable cause failed the balancing test required by the state constitution's special needs analysis). Cf. *Petitioner F v. Brown*, 306 S.W.3d 80, 89, 82–83 (Ky. 2010) (interpreting *Samson* as limited to "certain cases" involving the reduced expectation of privacy that accompanies a conviction, and therefore using the special needs rubric to evaluate DNA testing of juveniles who were adjudicated public offenders for certain crimes).

371. *Grady v. North Carolina*, 575 U.S. 306 (2015) (per curiam); see *State v. Grady*, 817 S.E.2d 18, 22 (N.C. Ct. App. 2018) (noting that the Supreme Court "direct[ed] us to consider two approaches" in evaluating the electronic monitoring on remand), *modified and aff'd*, 831 S.E.2d 542, 555–57, 568 (N.C. 2019) (applying both the special needs doctrine and the balancing model); see also *Park v. State*, 825 S.E.2d 147, 153 (Ga. 2019) (agreeing that, "[p]ursuant to" *Grady*, "two relevant issues . . . must be addressed"). The Supreme Court's opinion in *Grady* is discussed *supra* notes 298–302 and accompanying text.

372. *Park*, 825 S.E.2d at 158.

373. See *id.* at 154–56.

374. *Id.* at 153.

defendants who had finished serving “their entire sentences” and were no longer on parole or probation.³⁷⁵ The Georgia court was also unimpressed with the State’s reliance on the “civil regulatory” restrictions imposed on sexually dangerous predators, reasoning that requiring them to avoid certain locations and disclose information like their address had “nothing to do with . . . constantly tracking [their] movements in order to look for evidence of a crime.”³⁷⁶

The Massachusetts Supreme Judicial Court went further in *Commonwealth v. Feliz* and applied the balancing test in striking down as “overinclusive” a state statute instructing judges to order GPS monitoring as a condition of probation for defendants convicted of most sex offenses.³⁷⁷ Probation conditions requiring GPS monitoring must be based on “individualized determinations of reasonableness,” the court held, and therefore “[m]andatory, blanket imposition of GPS monitoring” could not be imposed on every sex offender on probation.³⁷⁸ Although the court’s decision was based on its own state constitution, its opinion quoted extensively from the Supreme Court’s balancing

375. *Id.*

376. *Id.* at 154. *But see id.* at 158–59 (Blackwell, J., concurring) (noting that the court’s opinion did not foreclose a statute requiring that some sex offenders be subjected to monitoring as a condition of lifetime probation). For holdings similar to *Park*, see *State v. Grady*, 831 S.E.2d 542, 546–47, 559, 564, 565, 567 (N.C. 2019) (concluding, on remand from the Supreme Court, that the State had not met its burden of showing that mandatory lifetime GPS monitoring survived the balancing test with respect to recidivist sex offenders who were no longer on probation or supervised release, reasoning that lifetime participation in a sex offender registry does not diminish one’s expectation of privacy “in all other aspects of his daily life,” that electronic monitoring effects “a deep, if not unique, intrusion upon . . . protected Fourth Amendment interests,” and that the evidence of sex offender recidivism rates was “inconclusive” and the State had provided no evidence of the monitoring program’s “efficacy . . . in advancing any of its asserted legitimate State interests”); and *State v. Ross*, 815 S.E.2d 754, 757–59 (S.C. 2018) (striking down a state statute requiring “automatic, mandatory” lifetime electronic monitoring for failing to register as a sex offender following a conviction for certain sex offenses involving minors on the grounds that the defendant had finished serving his sentence and was not on probation, and “a relatively innocent technical failure to register” was “a significantly different indicator of the likelihood of reoffending than a non-technical failure”; therefore requiring “an individualized inquiry” assessing whether monitoring was “an unreasonable search based on the totality of the circumstances” in the particular case). *But see Grady*, 831 S.E.2d at 573 (Newby, J., dissenting) (concluding that the balancing test favored the State); *Ross*, 815 S.E.2d at 759 (Beatty, C.J., concurring in the result without opinion).

377. *Commonwealth v. Feliz*, 119 N.E.3d 700, 703–04 (Mass. 2019).

378. *Id.* at 710.

model opinions.³⁷⁹ In evaluating the reasonableness of the monitoring imposed in that case, the court conceded that probationers have a reduced expectation of privacy but noted that GPS devices impose “a far greater intrusion on the defendant’s liberty” than “traditional probation monitoring.”³⁸⁰ Despite acknowledging the “strong” governmental interest in safeguarding the community from sex offenders, the court concluded that the balancing test favored the defendant, whose conviction involved “noncontact sex offenses,” because the Government had provided no evidence that he presented “a threat of reoffending” or violating the conditions of his probation.³⁸¹

The same court reached a similar conclusion in *Commonwealth v. Norman*, concluding that GPS tracking of a suspected drug dealer who was required as a condition of pretrial release to stay out of Boston did not survive the balancing test.³⁸² Rejecting the argument that the defendant had voluntarily consented to the monitoring,³⁸³ the court reasoned that pretrial releasees have a greater expectation of privacy than probationers³⁸⁴ and that GPS tracking is the equivalent of a “modern-day ‘scarlet letter.’”³⁸⁵ On the Government’s side of the balance, the court thought that the GPS monitoring did not serve the bail statute’s purposes of ensuring the defendant’s presence at trial and protecting victims and witnesses.³⁸⁶

But other courts assessing the constitutionality of electronic monitoring have weighed the competing interests in favor of the

379. *See id.* at 709–11 (citing *Grady v. North Carolina*, 575 U.S. 306, 310 (2015) (per curiam); *Maryland v. King*, 569 U.S. 435, 448 (2013); *Samson v. California*, 547 U.S. 843, 848 (2006); *United States v. Knights*, 534 U.S. 112, 118–20 (2001)).

380. *Id.* at 713 (quoting *Commonwealth v. Goodwin*, 933 N.E.2d 925, 935 (Mass. 2010)).

381. *Id.* at 714–15. The court also rejected a special needs rationale for the monitoring. *See id.* at 710 n.17. *But cf.* *Commonwealth v. Johnson*, 119 N.E.3d 669, 680–81 (Mass. 2019) (distinguishing *Feliz* where a probationer requested GPS tracking and had a history of recidivism).

382. *Commonwealth v. Norman*, 142 N.E.3d 1, 3–4 (Mass. 2020).

383. *See id.* at 6–7.

384. *See id.* at 6.

385. *Id.* at 9 (citation omitted) (quoting *Commonwealth v. Hanson H.*, 985 N.E.2d 1181, 1186 (2013)); *see also* Kate Weisburd, *Sentenced to Surveillance: Fourth Amendment Limits on Electronic Monitoring*, 98 N.C. L. REV. 717, 755 (2020) (documenting the “significant dignity costs” of GPS monitoring).

386. *See Norman*, 142 N.E.3d at 9. For other cases analyzing conditions of pretrial release under the balancing approach, *see supra* notes 352–361 and accompanying text.

government. In *Belleau v. Wall*, the Seventh Circuit upheld a Wisconsin statute requiring lifetime GPS monitoring for anyone released from civil commitment for a sex offense.³⁸⁷ Although the plaintiff was not on any form of supervised release, the court thought that he could not be “certified as harmless merely because he no longer is under any of the more familiar kinds of post-imprisonment restriction.”³⁸⁸ Rather, the court reasoned, pedophiles like the plaintiff were “predispose[d] . . . to commit sexually violent acts”³⁸⁹ and electronic monitoring could help reduce sex offenders’ recidivism rates.³⁹⁰ Finally, the Seventh Circuit argued that GPS monitoring was “less intrusive than a conventional search,” and that its “incremental” impact on the plaintiff’s privacy was “slight” given that his criminal record and home address were public information, and therefore his “privacy [had] already been severely curtailed as a result of his criminal activities.”³⁹¹

In *Holland v. Rosen*, a case challenging the constitutionality of New Jersey’s bail statute, the Third Circuit similarly found that the plaintiff was unlikely to succeed on the merits of his claim that home detention and electronic monitoring were unreasonable conditions of pretrial release on a charge that did not involve a sex offense.³⁹² The court distinguished the GPS tracking in *Grady* on the grounds that Holland, unlike Grady, had consented to the monitoring.³⁹³ Then, relying on *Maryland v. King*, the court reasoned that Holland’s arrest for “a

387. *Belleau v. Wall*, 811 F.3d 929, 937 (7th Cir. 2016).

388. *Id.* at 934.

389. *Id.* at 932–33 (quoting psychologist’s evaluation).

390. *See id.* at 936 (citing STEPHEN V. GIES, RANDY GAINEY, MARCIA I. COHEN, EOIN HEALY, DAN DUPLANTIER, MARTHA YEIDE, ALAN BEKELMAN, AMANDA BOBNIS & MICHAEL HOPPS, MONITORING HIGH-RISK SEX OFFENDERS WITH GPS TECHNOLOGY: AN EVALUATION OF THE CALIFORNIA SUPERVISION PROGRAM, FINAL REPORT, 3-11, 3-13 (2012)). *But see* Weisburd, *supra* note 385, at 723–24 (finding “no empirical evidence . . . that broadly applied electronic surveillance corresponds to greater public safety, increased rehabilitation, or lower recidivism rates,” and arguing that it may instead be “criminogenic, by focusing on perfect detection and enforcement” of “technical” violations of parole and probation conditions).

391. *Belleau*, 811 F.3d at 937, 934–35 (emphasis omitted); *see also* *State v. Kane*, 169 A.3d 762, 772–74 (Vt. 2017) (upholding GPS monitoring as a condition of probation under *Knights* and *Samson*). *But see* Weisburd, *supra* note 385, at 754–55 (calling electronic monitoring “an unprecedented blow to privacy of the nonincarcerated” because, unlike traditional searches, it enables “law enforcement, with the click of a mouse, to access immense amounts of personal, otherwise private, information at any time of day and without notice to the defendant”).

392. *Holland v. Rosen*, 895 F.3d 272, 302 (3d Cir. 2018).

393. *See id.* at 301.

dangerous offense” (second-degree aggravated assault) reduced his reasonable expectation of privacy, and the State had “a substantial interest” in making sure arrestees do not flee before trial and a “‘legitimate and compelling’ interest” in preventing them from committing other crimes.³⁹⁴

Although the constitutionality of electronic monitoring could be, and has been, evaluated under the special needs rubric,³⁹⁵ this is an area where the reasonableness-balancing model is likely to continue playing a role and generating disagreement among the lower courts.

d. New Contexts

In a few of the cases where defendants prevailed under the balancing test, the lower courts nevertheless extended the Supreme Court’s reasonableness-balancing model decisions by applying the balancing approach in different contexts. In *United States v. Bain*, for example, the police found a set of keys during a search incident to an arrest that took place outside of a residential building.³⁹⁶ They used the keys on the front door of the building and three different apartments inside the building to ascertain where Bain lived and then obtained a search warrant for his apartment.³⁹⁷ In concluding that the balancing test favored the defendant, the First Circuit rejected the Government’s argument that “testing a key in a lock” is a “‘minor’ or ‘minimal’” intrusion; rather, the court responded, the “key point” is that the police made a warrantless entry into the curtilage of the defendant’s residence “solely to gather information to be used in building a criminal case against him.”³⁹⁸ Although the Seventh Circuit had reached a contrary conclusion in *United States v. Concepcion*, reasoning that the defendant’s address was information law enforcement “could have ascertained in many other ways” and therefore “no secret,”³⁹⁹ the First

394. *Id.* at 301–02 (quoting *Maryland v. King*, 569 U.S. 435, 463, 452–53 (2013) (quoting *United States v. Salerno*, 481 U.S. 739, 749 (1987))).

395. *See supra* notes 302, 373, 381 and accompanying text.

396. *United States v. Bain*, 874 F.3d 1, 8 (1st Cir. 2017).

397. *See id.*

398. *Id.* at 17, 19.

399. *United States v. Concepcion*, 942 F.2d 1170, 1173 (7th Cir. 1991). *Concepcion* predated the Supreme Court’s three balancing model cases, but the Seventh Circuit emphasized that the Fourth Amendment mandates that searches be “reasonable,” and, while “a warrant may be an essential ingredient of reasonableness much of the time,” it is not required “for less intrusive searches.” *Id.* at 1172. *Cf. United States v. Correa*, 908 F.3d 208, 219, 212 (7th Cir. 2018) (relying on *Concepcion* in allowing DEA agents to determine which building was linked to a garage door opener, “at least where the search disclose[d] . . . only an address, not any meaningful private

Circuit thought that argument cut the other way. The “ease” of finding another source for the information undermined the “need to access the home” moreso than it “minimize[d] the nature of the intrusion,” the court explained, concluding that the governmental interests did not outweigh the defendant’s privacy interests.⁴⁰⁰ Although the opinion focused on a balancing analysis, the court also mentioned that exigency is the “main exception[]” for warrantless searches of homes and no exigent circumstances existed there.⁴⁰¹

In *Ioane v. Hodges*, the Ninth Circuit rejected a qualified immunity defense in a § 1983 case on the grounds that a jury could reasonably find that an IRS agent violated the Fourth Amendment when, during the execution of a search warrant for the Ioane residence, she monitored Shelly Ioane’s use of the bathroom.⁴⁰² The court found that Ioane did not have a reduced expectation of privacy, noting that she was neither under detention nor “the subject” of the warrant and had a “heightened privacy interest[]” in her home.⁴⁰³ Moreover, the court thought that “the manner of [the] intrusion” favored Ioane because the agent “stood facing” her in the bathroom rather than using “a manner of observation” that was “obscured” or “restricted.”⁴⁰⁴ Weighing the Government’s side of the balance, the Ninth Circuit relied on the holding in *Ybarra v. Illinois* that a search warrant does not necessarily authorize the search of individuals found on the premises⁴⁰⁵ and distinguished other warrant-presumption model opinions allowing police to frisk potentially dangerous individuals and to detain residents while executing a search warrant.⁴⁰⁶

information about the interior or contents of the garage,” and where the garage was “shared by many residents of [a] building”).

400. *Bain*, 874 F.3d at 18.

401. *Id.* at 16–17, 19.

402. *Ioane v. Hodges*, 939 F.3d 945, 949–50 (9th Cir. 2019). *See generally* *Harlow v. Fitzgerald*, 457 U.S. 800, 818 & n.30 (1982) (granting qualified immunity to executive-branch officials defending civil rights suits filed under § 1983 so long as “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known”).

403. *Ioane*, 939 F.3d at 954, 956.

404. *Id.* at 954.

405. *See id.* at 955 (citing *Ybarra v. Illinois*, 444 U.S. 85, 91–92 (1979)).

406. *See id.* at 954–56 (rejecting destruction of evidence concerns because the Ioanes were told they were free to leave during the search, and dismissing safety concerns because the agents had already searched the bathroom for weapons and had apparently monitored the Ioanes for about half an hour without frisking them); *cf. id.* at 960–61 (Bea, J., concurring in part and concurring in the judgment) (concluding that the majority’s finding that

By a vote of four to three, the Minnesota Supreme Court in *State v. Henning* applied a balancing analysis in striking down a state statute that allowed police to make a traffic stop and check the driver's license whenever they spotted a car with a "special series registration" license plate—a plate issued when someone who will be driving the vehicle has had her license suspended or revoked but is still permitted to drive for limited purposes, for example, to work or to school.⁴⁰⁷ Citing both *Knights* and the administrative inspection opinion in *Delaware v. Prouse* for the balancing test,⁴⁰⁸ the majority acknowledged the "minimally intrusive" nature of the seizure at issue there and the State's "obvious and substantial interest" in safeguarding the community from "repeat drunken drivers."⁴⁰⁹ Nevertheless, the court thought the State had not provided sufficient justification for ignoring the "general" individualized suspicion requirement and for subjecting drivers in cars with special series plates to "repeated stops at the unchecked discretion" of the police rather than relying on "more conventional means" of arresting drunk drivers.⁴¹⁰

Although these three courts ultimately concluded that the governmental intrusion did not survive the balancing test, they did choose to extend the reasonableness-balancing model to contexts beyond those featured in the Supreme Court's precedents. And they did so despite the fact that they each found warrant-presumption model case law that could have justified invalidating the law enforcement conduct in question.

Aside from these three cases, the other defendant-friendly lower court opinions discussed in this Section unequivocally hesitated to give the Supreme Court's reasonableness-balancing model a broad reading—refusing to apply a balancing approach, requiring prosecutors to satisfy both models, or balancing in favor of the defendant. But most of those decisions were met with resistance, either within the court itself or from

the agent's action was "unreasonable" was "likely" correct, but disagreeing that the constitutional violation was sufficiently clearly established to justify the denial of qualified immunity; nevertheless concurring in the result on the grounds that the agent's actions were inconsistent with *Ybarra*).

407. *State v. Henning*, 666 N.W.2d 379, 384–85 (Minn. 2003). *But see id.* at 387 (Meyer, J., dissenting) (arguing that the State should prevail under the balancing approach).

408. *Id.* at 383–84 (majority opinion) (citing *United States v. Knights*, 534 U.S. 112, 118–19 (2001); *Delaware v. Prouse*, 440 U.S. 648, 654 (1979)). The court also noted that *Prouse* required reasonable suspicion to stop a vehicle. *See id.* at 383.

409. *Id.* at 386 (quoting *Ascher v. Comm'r of Pub. Safety*, 519 N.W.2d 183, 187 (Minn. 1994)).

410. *Id.* at 385–86.

other courts. The Section that follows continues to explore other lower court rulings that have applied the balancing model in new arenas.

4. Expanding the Reach of the Balancing Model

In addition to the three decisions discussed in the previous Section, some lower court opinions have cited the Supreme Court's reasonableness-balancing model trilogy in a few other discrete areas: foreign intelligence and national security searches, weapons seizures, roadblocks and group seizures, and BAC testing in DUI cases.⁴¹¹ This Section analyzes those issues in turn, concluding that, to date, the lower courts have obviously extended the balancing approach only in cases involving foreign intelligence and national security searches.

a. Foreign Intelligence/National Security Searches

The one context in which the reasonableness-balancing model has clearly been influential in expanding law enforcement powers in federal cases is foreign intelligence and national security searches. Even here, however, the federal case law has not universally favored the government.

The Second and Seventh Circuits have relied on a balancing approach to assess the constitutionality of extraterritorial searches of American citizens conducted by United States officials. The Second Circuit led the way in *United States v. Odeh (In re Terrorist Bombings of United States Embassies in East Africa)*, extending the Supreme Court's ruling in *United States v. Verdugo-Urquidez* that the Fourth Amendment does not govern American officials' overseas searches of foreign nationals⁴¹² and recognizing that a foreign intelligence exception to the warrant requirement applies to overseas searches of American citizens.⁴¹³ Noting that the Court warned in *Verdugo-Urquidez* that an American search warrant would be "a dead letter" in any other

411. For a few other miscellaneous cases, see *United States v. Seerden*, 916 F.3d 360, 365 (4th Cir. 2019) (relying on *Samson*'s balancing test in discussing the search of a cell phone belonging to a Navy SEAL and cautioning that the competing interests relevant in assessing military and civilian searches are "different" given the "significant interest in maintaining order and control" in the military, but ultimately finding no need to conduct a balancing analysis because the good-faith exception to the exclusionary rule applied); and *United States v. Gould*, 364 F.3d 578, 583–84 (5th Cir. 2004) (en banc) (applying the *Knights* balancing test to evaluate a protective sweep), *overruled on other grounds by* *Kentucky v. King*, 563 U.S. 452 (2011). For further discussion of *Gould* and protective sweeps, see *supra* notes 172–175 and accompanying text.

412. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274–75 (1990).

413. *United States v. Odeh (In re Terrorist Bombings of United States Embassies in East Africa)*, 552 F.3d 157, 167 (2d Cir. 2008).

country,⁴¹⁴ the Second Circuit reasoned that the Warrant Clause does not govern extraterritorial searches of American citizens. Rather, the court held, these searches “need only satisfy the Fourth Amendment’s requirement of reasonableness.”⁴¹⁵

Interestingly, the court refused to rely on other federal appellate cases that had recognized a foreign intelligence warrant exception under the warrant-presumption model⁴¹⁶ on the grounds that the warrant exception endorsed by those courts required a showing that the primary purpose of the search was to gather foreign intelligence information.⁴¹⁷ Relying instead on *Samson* and *Knights*, the Second Circuit applied the totality-of-the-circumstances balancing test in concluding that the extraterritorial search at issue there was reasonable.⁴¹⁸

The Seventh Circuit subsequently endorsed the Second Circuit’s reasoning in *United States v. Stokes*.⁴¹⁹ And, in *United States v. Vilar*, the Second Circuit refused to limit the foreign intelligence exception to cases involving terrorism or “similarly horrific crime[s]” and applied the balancing test in upholding the search of a London warehouse during a securities fraud investigation.⁴²⁰ According to these courts, therefore, the constitutionality of extraterritorial searches of American citizens is determined by applying the balancing test to the facts of the particular case.⁴²¹

414. *Id.* at 168–69 (quoting *Verdugo-Urquidez*, 494 U.S. at 274).

415. *Id.* at 167.

416. *See, e.g.*, *United States v. Truong Dinh Hung*, 629 F.2d 908, 914–15 (4th Cir. 1980); *see also In re Certified Question of Law*, 858 F.3d 591, 605–07 (D.C. Cir. 2016) (per curiam) (citing additional cases recognizing a foreign intelligence warrant exception); *cf. United States v. United States Dist. Ct. (Keith)*, 407 U.S. 297, 321–22 (1972) (refusing to recognize a warrant exception for “domestic . . . national security,” but leaving open “the issues which may be involved with respect to activities of foreign powers or their agents”).

417. *See Odeh*, 552 F.3d at 171–72. *But see In re Directives Pursuant to Section 105b of the Foreign Intel. Surveillance Act*, 551 F.3d 1004, 1011 (D.C. Cir. 2008) (rejecting the primary purpose requirement given that the Patriot Act replaced “the talismanic phrase ‘primary purpose’” with “‘a significant purpose’” (quoting *In re Sealed Case No. 02-001*, 310 F.3d 717, 742–45 (D.C. Cir. 2002))).

418. *See Odeh*, 552 F.3d at 172–73.

419. *United States v. Stokes*, 726 F.3d 880, 893 (7th Cir. 2013).

420. *United States v. Vilar*, 729 F.3d 62, 86 (2d Cir. 2013).

421. *See Stokes*, 726 F.3d at 893–94; *Odeh*, 552 F.3d at 172; *cf. United States v. Hasbajrami*, 945 F.3d 641, 664, 666–67 (2d Cir. 2019) (concluding that a warrant was not required to continue monitoring communications from a person in the United States whose identity was incidentally uncovered while tracking a foreign national’s email communications, and then going on to

Although the Ninth Circuit likewise used the balancing test in a national security context in *Al Haramain Islamic Foundation, Inc. v. United States Department of the Treasury*, the court thought the balancing process weighed against the Government.⁴²² The court therefore ruled in favor of a foundation when its assets were frozen after it had been designated a terrorist organization by the Treasury Department's Office of Foreign Assets Control (OFAC).⁴²³ After rejecting the Government's special needs argument,⁴²⁴ the Ninth Circuit turned to "the 'general reasonableness' test."⁴²⁵ Assuming without deciding that the reasonableness model applies to seizures as well as searches, the court of appeals explained that, although the governmental interest in combating terrorism is "extremely high," that "vital mission" did not mean OFAC's blocking orders were "per se reasonable" in every case.⁴²⁶ Rather, the court thought that OFAC should seek a warrant "in the normal course."⁴²⁷ Moreover, unlike the Supreme Court's balancing model opinions, which involved "greatly diminished" expectations of privacy, the Ninth Circuit noted that OFAC's jurisdiction is unlimited, and therefore the individuals and entities "potentially subject to seizure" orders do not have a reduced expectation of privacy because "that class includes everyone."⁴²⁸

Two D.C. Circuit opinions likewise engaged in a balancing analysis in the national security context, but those decisions seemingly endorsed the position described above⁴²⁹ that requires prosecutors to satisfy both the warrant-presumption model and the reasonableness model.⁴³⁰

find the monitoring reasonable under the balancing test); *United States v. Mohamud*, 843 F.3d 420, 438, 441 (9th Cir. 2016) (holding that the Fourth Amendment did not apply to the monitoring of a foreign national's email communications that incidentally uncovered email messages from persons, including the defendant, who were in the United States, but observing that, even if the defendant had "a Fourth Amendment right in the incidentally collected communications," he would lose under the balancing test and the search was therefore reasonable).

422. *Al Haramain Islamic Found., Inc. v. U.S. Dep't of the Treasury*, 686 F.3d 965, 994–95 (9th Cir. 2012).

423. *See id.* at 970.

424. *See id.* at 990–93.

425. *Id.* at 993.

426. *Id.* at 994.

427. *Id.*

428. *Id.*

429. *See supra* notes 334–343 and accompanying text.

430. *See In re Directives Pursuant to Section 105b of the Foreign Intel. Surveillance Act*, 551 F.3d 1004, 1010–12 (D.C. Cir. 2008) (analogizing to

Although the D.C. Circuit opinions therefore do not unambiguously broaden the reach of the Supreme Court's reasonableness-balancing model trilogy, the Second, Seventh, and Ninth Circuits have applied the model to national security cases.

This Section next turns to several additional areas where other federal court opinions may have made inroads in extending the balancing analysis.

b. Weapons Seizures

A few federal courts have arguably expanded the reasonableness-balancing model to cases involving the temporary seizure of weapons discovered during a lawful police entry. But the reasoning of these opinions is somewhat opaque, they did not explicitly rely on the trilogy's balancing analysis, and it is not evident to what extent they were applying a balancing approach not authorized by the warrant-presumption model.

In *United States v. Lewis*, the Eighth Circuit analyzed whether officers who were questioning the defendant in his workplace about a person of interest violated the Fourth Amendment when they briefly seized a handgun they saw on a shelf to check whether it was loaded.⁴³¹ Starting off by describing the warrant-presumption model, the court rejected the Government's argument that the seizure fell within the plain view exception to the warrant requirement on the grounds that the police did not have probable cause to believe the weapon was

the special needs cases in recognizing a foreign intelligence warrant exception for national security surveillance of foreign governments and their agents who are "reasonably believed to be . . . outside the United States," but then citing *Samson* and *Knights*, as well as several Supreme Court warrant-presumption model precedents, in applying "[t]he totality of the circumstances model" and "balanc[ing] the interests at stake" to determine whether the surveillance was "a sufficiently reasonable exercise of governmental power" to comply with "the Fourth Amendment's reasonableness requirement"); see also *In re Certified Question of Law*, 858 F.3d 591, 593–94, 607, 610 (D.C. Cir. 2016) (per curiam) (describing *In re Directives* as "virtually control[ling]" and analogizing to the special needs cases in concluding that a warrant based on probable cause is not required when a pen register is used on someone in this country who is "reasonably believed to be engaged in clandestine intelligence activities" for another country and that the Foreign Intelligence Surveillance Court may authorize a pen register that records numbers dialed during a phone call, even though it might incidentally collect "content information" (such as passwords or credit card numbers); then going on to say that the Fourth Amendment still had a "role to play," quoting the touchstone mantra in holding that "[t]he textual command of reasonableness . . . still governs," and weighing the relevant competing interests in analyzing "the question of reasonableness").

431. *United States v. Lewis*, 864 F.3d 937, 940 (8th Cir. 2017).

evidence of a crime.⁴³² The court then moved on to the prosecution's alternative argument that "officer-safety concerns justified the warrantless seizure."⁴³³ Here, again, the Eighth Circuit continued applying the warrant-presumption model, distinguishing cases allowing warrantless seizures where police are executing a search warrant or have reasonable suspicion of criminal activity.⁴³⁴

But the court also used the touchstone language and set out the balancing test, although citing only warrant-presumption model cases in support and therefore still not obviously straying from that approach.⁴³⁵ The opinion then explained that seizures generally require a warrant but that there are "sometimes" exceptions to the warrant requirement.⁴³⁶ Here, the Eighth Circuit did quote the statement in *Maryland v. King* that a special need, reduced expectation of privacy, minimal intrusion, "or the like" may justify a warrantless seizure.⁴³⁷ The court did not explicitly rely on *King's* balancing approach, however, though it did go on to weigh the competing interests.⁴³⁸

In considering the Government's side of the equation, the court thought that "*Terry's* principles" were "relevant" even in the absence of reasonable suspicion.⁴³⁹ The Eighth Circuit gratuitously added that law enforcement officials' "investigatory interest" can vary from case to case depending on what type of crime they suspect, suggesting a balancing approach that turns on the facts of a particular case.⁴⁴⁰ But in the end the court relied on *Terry* in concluding that the "strong interest" in safeguarding officers while "they legitimately investigate any crime" allowed them to seize a weapon found in plain view if they

432. *See id.* at 943–44.

433. *Id.* at 943.

434. *See id.* at 944–46.

435. *See id.* at 945 (citing *County of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1546 (2017) (excessive force); *Michigan v. Long*, 463 U.S. 1032, 1046 (1983) (*Terry* frisk of a car)).

436. *Id.*

437. *Id.* (quoting *Maryland v. King*, 569 U.S. 435, 447 (2013)). For additional discussion of this language, see *supra* notes 159–162 and accompanying text.

438. *See Lewis*, 864 F.3d at 945–46 (explaining that the intrusiveness of the seizure was "minimal" and "substantially less significant" than a *Terry* frisk given its "narrow purpose" and "short" length, and that *Terry's* "immediate interest in officer safety" was equally implicated in both cases although its "secondary . . . interest" in "investigating and preventing potentially ongoing crime" was "more difficult" to assess because the officer in *Terry* had reasonable suspicion an armed robbery was imminent).

439. *Id.* at 946.

440. *Id.*

had a reasonable suspicion their “safety or that of others was in danger.”⁴⁴¹ The Eighth Circuit therefore articulated what appears to be a categorical rule, following the balancing process used in the *Terry* line of cases to determine the permissible scope of a stop and frisk. Moreover, the court indicated that its conclusion “agree[d] with” and was “consistent with” other lower court opinions allowing “intrusions justified by officer safety concerns,” several of which were clearly applying the warrant-presumption model.⁴⁴²

But the other two cases cited by the Eighth Circuit are not so clear. In the first, *United States v. Rodriguez*, the Fifth Circuit, though finding that the plain view exception did not apply, nevertheless allowed police officers who were responding to a 911 report of “a violent domestic dispute” to seize a shotgun found during their protective sweep of the residence.⁴⁴³ The court reasoned that “domestic disputes often involve high emotions and can quickly escalate to violence,” and “[c]ommon sense dictates” that a dangerous weapon should be unloaded and “at least temporarily” secured.⁴⁴⁴ Although the court did not rely on any particular warrant exception here, it did not cite the reasonableness-balancing model cases or engage in a balancing analysis. And, in a footnote, the court clarified that it was not endorsing every seizure of a weapon but was merely holding that police officers performing a protective sweep may temporarily seize a weapon to enable them to “safely conduct their investigation.”⁴⁴⁵ Like the Eighth Circuit’s opinion in *Lewis*, then, the Fifth Circuit seemed to be announcing a categorical rule about the permissible reach of a protective sweep.

The final case the Eighth Circuit cited in *Lewis* was the Tenth Circuit’s opinion in *United States v. Gordon*, which in turn relied on the Fifth Circuit’s decision in *Rodriguez* in concluding that police could seize a loaded shotgun they found while investigating a 911 domestic violence call.⁴⁴⁶ But one of the officers impermissibly kept the gun after he had left the premises, only to learn shortly thereafter the defendant

441. *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968)). The court found that the seizure of Lewis’s handgun was not supported by reasonable suspicion because the officers did not suspect him of any crime and did not know whether the gun was loaded. *See id.* at 947.

442. *Id.* at 946 (citing *United States v. Poe*, 462 F.3d 997, 1000 (8th Cir. 2006) (applying the exigent circumstances exception); *United States v. Bishop*, 338 F.3d 623, 628 (6th Cir. 2003) (relying on *Terry*)).

443. *United States v. Rodriguez*, 601 F.3d 402, 407–08 (5th Cir. 2010).

444. *Id.* at 408.

445. *Id.* at 408 n.2.

446. *United States v. Gordon*, 741 F.3d 64, 71 (10th Cir. 2014) (citing *Rodriguez*, 601 F.3d at 408).

had a prior felony conviction that made possession of the weapon illegal.⁴⁴⁷ Noting that the Fourth Amendment proscribes only unreasonable searches, the Tenth Circuit asserted that courts often allow “*de minimis* intrusions into a person’s possessory interest in property, and even liberty interests.”⁴⁴⁸ The court then set out the balancing test, concluding that the officer’s continued possession of the weapon for the “few minutes” that intervened between leaving the house and discovering the defendant was a felon was a permissible “*de minimis* intrusion.”⁴⁴⁹

The court did not mention the Supreme Court’s reasonableness-balancing model trilogy, instead citing the Court’s earlier opinion in *United States v. Jacobsen* for both the balancing analysis and the purported permissibility of minor intrusions.⁴⁵⁰ But *Jacobsen*, in applying a balancing test and holding that performing a chemical test on “a trace amount” of a white powder that had been lawfully seized “at most” had “only a *de minimis* impact on any protected property interest” and was therefore reasonable, relied on precedent that did not depart substantially from the warrant-presumption model.⁴⁵¹ Moreover, *Jacobsen*’s reasoning was implicitly undermined by the Court’s subsequent refusal in *Arizona v. Hicks* to allow a “cursory inspection” that did not rise to the level of a “full-blown search” on a standard lower than probable cause because the Court was “unwilling” to create “a new thicket of Fourth Amendment law” depending on the intrusiveness of a search.⁴⁵² The precedent cited by the Tenth Circuit therefore may not have justified its reliance on a balancing approach,⁴⁵³ but, of the three

447. *See id.* at 72.

448. *Id.*

449. *Id.* at 73.

450. *See id.* at 72–73 (citing *United States v. Jacobsen*, 466 U.S. 109, 125–26 (1984)).

451. *Jacobsen*, 466 U.S. at 125 & n.26 (citing *Michigan v. Long*, 463 U.S. 1032, 1046–47 (1983); *United States v. Place*, 462 U.S. 696, 703 (1983); *Delaware v. Prouse*, 440 U.S. 648, 654 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975); *Cardwell v. Lewis*, 417 U.S. 583, 591–92 (1974) (plurality opinion); *Terry v. Ohio*, 392 U.S. 1, 20–21 (1968); *Camara v. Mun. Ct.*, 387 U.S. 523, 536–37 (1967)).

452. *Arizona v. Hicks*, 480 U.S. 321, 328 (1987) (quoting *id.* at 335 (O’Connor, J., dissenting)); *see also* *Hayes v. Florida*, 470 U.S. 811, 814 (1985) (relying on *Davis v. Mississippi*, 394 U.S. 721, 727 (1969), in refusing to allow police to transport a suspect to the station for fingerprinting without probable cause even though fingerprinting involves “a much less serious intrusion” than other searches).

453. The Tenth Circuit’s only other support for the constitutionality of *de minimis* intrusions was three lower court cases, two of which were superseded by the Supreme Court’s holding in *Rodriguez v. United States*, 575 U.S. 348,

weapons seizure opinions, it came closest to extending the reach of the reasonableness-balancing model—though without explicitly citing the three Supreme Court opinions applying that model.

Although weapons seizures might therefore be a potential area of expansion for the reasonableness-balancing approach, the courts of appeals were not entirely transparent in their reasoning in these cases, and they did not expressly rely on the Supreme Court's reasonableness-balancing model. It is not clear, therefore, how far these opinions deviated from other lower court decisions that have resolved similar cases under the warrant-presumption model, concluding, for example, that the presence of a weapon creates reasonable suspicion of the crime of unlawful possession⁴⁵⁴ and reasonable suspicion of danger to the police even if the possession is lawful.⁴⁵⁵

c. Roadblocks and Group Seizures

As discussed above, several Supreme Court opinions have used the special needs rubric to approve of checkpoints that served some purpose other than ordinary criminal law enforcement and survived the

354–55 (2015), that even brief extensions of a traffic stop are impermissible. See *United States v. Munoz*, 590 F.3d 916, 922 (8th Cir. 2010); *United States v. Farrior*, 535 F.3d 210, 220 (4th Cir. 2008). For further discussion of *Rodriguez*, see *supra* notes 275–277 and accompanying text. The final case cited by the Tenth Circuit applied the warrant-presumption model. See *United States v. Enslin*, 327 F.3d 788, 795–98 (9th Cir. 2003) (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989); *Michigan v. Summers*, 452 U.S. 692, 697–98 (1983); *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977) (per curiam)) (allowing law enforcement official who was searching for a fugitive to order the defendant to show his hands). For further discussion of *Summers*, *Graham*, and *Mimms*, see *supra* notes 101–103, 110–113, 189–192 and accompanying text.

454. See, e.g., *United States v. Rodriguez*, 739 F.3d 481, 487–90 (10th Cir. 2013); *State v. Timberlake*, 744 N.W.2d 390, 394–97 (Minn. 2008). But see, e.g., *Northrup v. City of Toledo Police Dep't*, 785 F.3d 1128, 1131–32 (6th Cir. 2015) (holding that possession of a weapon in a state that permits the open carry of firearms is not enough to create reasonable suspicion of a crime); *United States v. Black*, 707 F.3d 531, 540 (4th Cir. 2013) (same).

455. See, e.g., *United States v. Robinson*, 846 F.3d 694, 700–01 (4th Cir. 2017) (en banc) (citing *Michigan v. Long*, 463 U.S. 1032, 1052 n.16 (1983); *Adams v. Williams*, 407 U.S. 143, 146 (1972)). For other federal court opinions that predate the Supreme Court's reasonableness-balancing model trilogy and allow the temporary seizure of a weapon during the execution of a search warrant in order to protect officer safety, without expressly invoking any warrant exception or engaging in a balancing analysis, see *United States v. Timpani*, 665 F.2d 1, 5 n.8 (1st Cir. 1981), and *United States v. Malachese*, 597 F.2d 1232, 1234–35 (8th Cir. 1979).

balancing test applied in administrative inspection cases.⁴⁵⁶ A few federal appellate courts have cited the Court's reasonableness-balancing model precedents in upholding roadblocks and other group seizures aimed at apprehending a fleeing criminal, thus potentially expanding the trilogy into another new arena. But, as with the weapons seizure cases, how far these opinions deviated from the warrant-presumption model is not obvious.

In *Palacios v. Burge*, the Second Circuit applied the reasonableness-balancing test in allowing police to detain the male patrons of a bar so that two stabbing victims could identify their assailants.⁴⁵⁷ But, as noted above, *Palacios* is an opinion that apparently requires the government to satisfy both the warrant-presumption model and the reasonableness-balancing model.⁴⁵⁸ Before engaging in its balancing analysis, the court referenced exigent circumstances, interpreting dictum from the Supreme Court's opinion in *Indianapolis v. Edmond* as "recognizing circumstances involving 'exigencies' that permit seizures without individualized suspicion."⁴⁵⁹

In *Edmond*, the administrative inspection opinion that refused to allow a suspicionless checkpoint "primarily for the ordinary enterprise of investigating crimes," the Court went on to add the following dictum: "[o]f course, there are circumstances that may justify a law enforcement checkpoint where the primary purpose would otherwise, but for some emergency, relate to ordinary crime control."⁴⁶⁰ By way of example, the *Edmond* Court mentioned "scenarios" that involve "exigencies," such as "an appropriately tailored roadblock set up to thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route."⁴⁶¹ But, contrary to the Second Circuit's

456. See *Illinois v. Lidster*, 540 U.S. 419, 428 (2004) (information-gathering roadblock); *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 447 (1990) (sobriety checkpoint); *United States v. Martinez-Fuerte*, 428 U.S. 543, 545 (1976) (immigration checkpoint). For further discussion of *Martinez-Fuerte*, *Sitz*, and *Lidster*, see *supra* notes 140–146, 220–234, 247–256 and accompanying text.

457. *Palacios v. Burge*, 589 F.3d 556, 559, 563–66 (2d Cir. 2009) (permitting the detention of about 170 men for approximately forty minutes, which led to the identification of six individuals).

458. See *supra* notes 340–343 and accompanying text.

459. *Palacios*, 589 F.3d at 562–63 (quoting *Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000)). For further discussion of *Edmond*, see *supra* notes 229–232 and accompanying text.

460. *Edmond*, 531 U.S. at 44.

461. *Id.*; cf. *Lidster*, 540 U.S. at 424–25 (distinguishing *Edmond* from "police activity" aimed at "crowd control or public safety," for which "the concept of individualized suspicion has little role to play").

assertion in *Palacios*,⁴⁶² the Supreme Court has consistently held that the exigent circumstances exception to the warrant requirement requires some level of individualized suspicion, and nothing in *Edmond*'s special needs analysis undermines that precedent.⁴⁶³

In applying the balancing test, the Second Circuit also found “instructive” the Supreme Court’s decision in *Illinois v. Lidster* because both cases involved the “need to acquire information about a recent crime that had occurred in the vicinity.”⁴⁶⁴ Although *Lidster* is similar to group seizure cases in that, “by definition, the concept of individualized suspicion has little role to play” when police cannot narrow down which cars or individuals were involved in a crime, key to *Lidster*’s approval of a checkpoint seeking information about a recent accident was the special need of asking motorists to help identify others who might have been involved.⁴⁶⁵ By contrast, roadblocks aimed at apprehending fleeing criminals are targeting the occupants of the cars themselves and therefore difficult to distinguish from ordinary criminal law enforcement.⁴⁶⁶

In *United States v. Paetsch*, the Tenth Circuit allowed police to barricade an intersection to catch a fleeing bank robber, thereby detaining twenty-nine people riding in twenty cars for about half an

462. See *Palacios*, 589 F.3d at 562 (stating that “[i]ndividualized suspicion is not needed” in exigent circumstances).

463. See, e.g., *Brigham City v. Stuart*, 547 U.S. 398, 400 (2006) (authorizing a warrantless entry into a home when police have “an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury”); *Kirk v. Louisiana*, 536 U.S. 635, 638 (2002) (per curiam) (pointing out that “police officers need either a warrant or probable cause plus exigent circumstances in order to make a lawful entry into a home”); cf. *Illinois v. McArthur*, 531 U.S. 326, 331–32 (2001) (listing the existence of probable cause as the first of four “circumstances, which . . . consider[ed] in combination,” permitted officers to impound a residence while they sought a warrant); *Maryland v. Buie*, 494 U.S. 325, 332–33 (1990) (observing that police had an arrest warrant, as well as probable cause to believe the defendant was home, in allowing a protective sweep of the residence). See generally Kinports, *supra* note 144, at 628–31.

464. *Palacios*, 589 F.3d at 564.

465. *Lidster*, 540 U.S. at 423–24. For further discussion of *Lidster*, see *supra* notes 247–256 and accompanying text.

466. But see *United States v. Whitehead*, 567 F. App’x 758, 767 (11th Cir. 2014) (per curiam) (concluding that a checkpoint “focused on one particular crime and one particular suspect” was “not for general crime detection” and therefore different from the narcotics checkpoints struck down in *Edmond*); *United States v. Abbott*, 265 F. App’x 307, 309 (5th Cir. 2008) (per curiam) (likewise distinguishing a roadblock “tailored to detect evidence of a particular criminal wrongdoing” from one aimed at “general crime control”).

hour.⁴⁶⁷ Unlike the Second Circuit, the Tenth Circuit acknowledged that suspicionless intrusions must be linked to a special need, but *Paetsch* read the *Edmond* dictum as equating emergencies with special needs and thereby allowing roadblocks without “individualized suspicion of a particular motorist.”⁴⁶⁸ But characterizing exigent circumstances as a special need that dispenses with any individualized suspicion requirement “conflat[es]” the warrant exceptions for exigent circumstances and special needs searches, and circumvents the Court’s traditional view that the exigent circumstances exception requires individualized suspicion.⁴⁶⁹

The Tenth Circuit went on in *Paetsch* to caution that the fact that the barricade fell within the *Edmond* dictum did not “entirely resolve” the case because the court must “still . . . examine” whether the barricade was “reasonable under the totality of the circumstances.”⁴⁷⁰ Although the opinion had previously quoted the touchstone mantra from *Samson*,⁴⁷¹ the court did not otherwise cite the reasonableness-balancing model precedents but instead concluded that the officers’ actions satisfied the three-factor balancing test set out in *Brown v. Texas*.⁴⁷²

Evaluating whether decisions like these have expanded the reasonableness-balancing model precedents is a bit tricky. Both the Second and Tenth Circuits were seemingly of the view that the prosecution must satisfy both Fourth Amendment models. *Palacios* and *Paetsch* may have relied on faulty reasoning, but they do not seem to have extended the reach of the balancing model.

Moreover, the en banc Fourth Circuit in *United States v. Curry* recently “decline[d] the government’s invitation to apply a free-form balancing test” in evaluating whether police responding to shots fired in a residential neighborhood were entitled to stop five to eight men in the vicinity, one of whom was found to be a felon in possession of a

467. *United States v. Paetsch*, 782 F.3d 1162, 1165 (10th Cir. 2015).

468. *Id.* at 1169–70.

469. *United States v. Curry*, 965 F.3d 313, 320 n.4 (4th Cir. 2020) (en banc) (quoting *United States v. Curry*, 937 F.3d 363, 378 (4th Cir. 2019) (Floyd, J., dissenting), *rev’d*, 965 F.3d 313 (4th Cir. 2020) (en banc)).

470. *Paetsch*, 782 F.3d at 1170.

471. *See id.* at 1169 (citing *Samson v. California*, 547 U.S. 843, 855 n.4 (2006)).

472. *See id.* at 1170 (citing *Brown v. Texas*, 443 U.S. 47, 51 (1979)); *see also* *United States v. Arnold*, 835 F.3d 833, 838–39 (8th Cir. 2016) (“adopt[ing] *Paetsch*’s reasoning,” quoting the touchstone language from *Samson*, briefly mentioning the *Edmond* dictum, and “appl[y]ing the balancing test” laid out in *Brown v. Texas* in allowing a roadblock designed to apprehend a fleeing bank robber). For further discussion of *Brown*, see *supra* notes 234–245 and accompanying text.

weapon (but not linked to the shooting).⁴⁷³ Relying instead on the exigent circumstances exception, the Fourth Circuit ultimately refused to “recalibrate the ‘balance’ struck” in *Terry* and allow suspicionless seizures in a case, unlike *Palacios* and *Paetsch*, where the police could not “narrowly target the seizures based on specific information of a known crime and a controlled geographic area.”⁴⁷⁴

Even if other courts disagree with the Fourth Circuit, *Edmond*, which was decided the year before *Knights*, laid the groundwork for *Palacios* and *Paetsch*, and the reasoning underlying the cryptic *Edmond* dictum is not entirely clear. This is an area in which the Supreme Court is “struggling,”⁴⁷⁵ and the “few” other lower court opinions that involve similar roadblocks are “not particularly helpful.”⁴⁷⁶ It could be that the *Edmond* dictum reflects the Court’s willingness to consider a new categorical exception to the warrant requirement: a variant of a *Terry* stop that allows a seizure of multiple persons or vehicles in cases involving less reason to believe each individual who is seized is connected to the crime, but greater exigency, a higher level of certainty that a serious crime occurred, and a lesser degree of intrusion given that the seizure is brief and no one person is singled out.⁴⁷⁷ Alternatively, roadblocks and other group seizures could be an area in which the reasonableness-balancing model will be extended.

d. Testing DUI Arrestees

The one area in which state courts have attempted to expand the reach of the reasonableness-balancing model is in cases allowing BAC testing following a DUI arrest.⁴⁷⁸ But the state courts have not all

473. *Curry*, 965 F.3d at 327, 316–18.

474. *Id.* at 330, 325–26.

475. 1 DRESSLER & MICHAELS, *supra* note 14, § 18.04[B][2], at 303.

476. 4 LAFAVE, *supra* note 47, § 9.7(a), at 970.

477. *See id.* at 972 (also noting that “somewhat different ingredients are involved” in the balancing analysis here compared to a traditional *Terry* stop); *see also id.* at 973–74 (reporting that the roadblocks upheld by the lower courts “with rare exception” have involved serious crimes); *cf.* Christopher Slobogin, *The Liberal Assault on the Fourth Amendment*, 4 OHIO ST. J. CRIM. L. 603, 612 (2007) (suggesting that “generalized suspicion” should suffice for “group searches,” with a lesser standard of proof required for less invasive intrusions like roadblocks).

478. *See State v. Birchfield*, 858 N.W.2d 302, 309–10 (N.D. 2015) (using what the court called “the general reasonableness requirement” to uphold a DUI arrestee’s conviction for refusing to submit to a BAC test, and reasoning that drivers have a reduced expectation of privacy “with respect to enforcement of drunk-driving laws” because they are “presumed to know the laws governing the operation of a motor vehicle”), *rev’d and remanded*, 136 S. Ct. 2160 (2016); *see also Williams v. State*, 167 So. 3d 483, 492–94 (Fla.

viewed the competing interests in the same light,⁴⁷⁹ and, at least for the moment, the Supreme Court seems to have fended off efforts to extend the balancing model to DUI cases.

In holding that police may perform breathalyzer but not blood tests when searching DUI suspects incident to arrest, the Supreme Court's opinion in *Birchfield v. North Dakota* impliedly rejected the approach taken by the lower courts that had relied on a balancing test to assess the constitutionality of those searches.⁴⁸⁰ Although *Birchfield* instead chose to analyze the case under the warrant-presumption model's exception for searches incident to arrest (without explanation, of course), these state court rulings did represent an attempt on the part of the lower courts to broaden the reach of the Supreme Court's three balancing model opinions.

This Part's discussion of Fourth Amendment case law after *Maryland v. King* suggests that, to date, the reasonableness-balancing model trilogy has had only a modest impact. The Supreme Court has continued to follow the warrant-presumption model in assessing the constitutionality of searches and seizures, although its per curiam opinion in *Grady v. North Carolina* suggested in dictum that the balancing model might be useful in cases involving electronic monitoring of offenders.⁴⁸¹

Dist. Ct. App. 2015) (applying *Maryland v. King*'s balancing approach in affirming a conviction for refusing a breathalyzer and allowing the testing under "a general reasonableness test" because "a breath test is minimally intrusive," the State had an implied consent statute, the defendant was "driving on a public road," and he was under arrest), *vacated and remanded*, No. SC15-1417, 2016 WL 6637817 (Fla. Nov. 9, 2016); *Beylund v. Levi*, 859 N.W.2d 403, 412, 414 (N.D. 2015) (relying on its previous decision in *Birchfield* in rejecting an unconstitutional-conditions challenge to a statute criminalizing DUI arrestees' refusal of BAC tests), *vacated and remanded sub nom. Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016).

479. In *State v. Villarreal*, 475 S.W.3d 784, 794 (Tex. Crim. App. 2014), the Texas Court of Criminal Appeals struck down a state statute that allowed warrantless blood draws following DWI arrests involving "certain aggravating factors," such as two prior DWI convictions. Although the court took the view that "a general Fourth Amendment balancing test" should not determine the statute's constitutionality, it went on to conclude that a balancing analysis would favor the defendant because "compelled physical intrusion beneath the skin" invades "significant privacy interests" and the State had "no compelling need" to address the drunk driving problem with warrantless blood draws when warrants are "often readily available." *Id.* at 808, 811. *But see id.* at 815–16 (Keller, J., dissenting) (arguing that the State should prevail under the balancing test). For a description of the majority's rejection of the balancing model, see *supra* notes 325–329 and accompanying text.

480. *Birchfield*, 136 S. Ct. at 2184. For further discussion of *Birchfield*, see *supra* notes 286–293 and accompanying text.

481. See *supra* notes 298–302 and accompanying text.

A survey of the lower court decisions that have cited the Supreme Court's reasonableness-balancing model opinions reveals that the prosecution has prevailed in most of the cases that have arisen in the same contexts as the trilogy—probationer and parolee searches and DNA testing—and that some lower courts have accepted *Grady's* implicit invitation to use a balancing analysis to evaluate the constitutionality of GPS tracking of offenders. But, even here, decisions favoring defendants can be found.

In addition, some lower courts have refused to apply the balancing framework, have required the prosecution to satisfy both the reasonableness-balancing model and the warrant-presumption model, and have concluded that defendants prevailed under the balancing test. And although some lower courts have arguably attempted to extend the balancing approach to a few other discrete contexts, the cases are few in number and in all but one area have not led to an obvious expansion of the trilogy because the courts were not clearly balancing outside the warrant-presumption framework or their efforts were rebuffed by the Supreme Court. Therefore, with the one exception of foreign intelligence and national security searches, the lower courts have not obviously taken advantage of the trilogy to replace the warrant-presumption model and aggressively broaden the reach of the reasonableness-balancing model.

C. The Future of the Reasonableness-balancing Model

The fact that the lower courts' application of the reasonableness-balancing model has not been as one-sided as the Supreme Court's does not discount the dangers associated with the balancing approach. Most of the defendant-friendly lower court opinions that either refused to engage in a balancing analysis or weighed the competing interests against the government provoked disagreement, either within the court itself⁴⁸² or with other courts,⁴⁸³ and therefore could just as easily have been decided the other way. Moreover, each of the cases where the balancing process favored the defendant⁴⁸⁴—and even some where it favored the prosecution⁴⁸⁵—could have been resolved under the warrant-presumption model instead of the reasonableness-balancing approach. Although the reasonableness-balancing model has not yet

482. *See supra* notes 315, 325, 338, 352, 366, 370, 376, 406, 407 and accompanying text.

483. *See supra* notes 344, 347–348, 358–361, 387–394, 399, 478–479 and accompanying text.

484. *See supra* notes 326, 339, 353, 367, 373, 381, 383, 401, 405–406, 408, 424 and accompanying text.

485. *See supra* notes 175, 416–417, 430, 454–455, 477, 480 and accompanying text.

made substantial inroads on Fourth Amendment jurisprudence, the lower court record confirms that a great deal of ambiguity surrounds both when and how the model should be applied.

This uncertainty should come as no surprise. The Supreme Court has never offered any hint as to why it resorted to pure balancing in the *Knights-Samson-King* trilogy. And an ad hoc balancing test that instructs judges to weigh all the relevant competing interests against each other is an inherently subjective exercise that invites differences of opinion.⁴⁸⁶

Presumably the Court devised the reasonableness-balancing model in *Knights* and returned to it in *Samson* and *King* because the Justices wanted to uphold the searches challenged in those cases but could not fit them into any established warrant exception. Unlike probation and parole officers, the law enforcement officials who conducted the searches in *Knights* and *Samson* were not acting in a supervisory capacity, and therefore the searches could not be justified as administrative inspections.⁴⁸⁷ And it is difficult to argue that a parolee or probationer who signs a release order has made a voluntary choice between prison and a search condition.⁴⁸⁸ King's DNA sample was taken at a booking facility, and not as part of a search incident to arrest, and the DNA test was intended to solve cold cases rather than serve some special need divorced from ordinary criminal law enforcement.⁴⁸⁹ Faced with these realities, the Justices seemingly created the reasonableness-balancing model simply to avoid invalidating the searches conducted in those three cases.

Although the lack of transparency surrounding the balancing model makes it difficult to predict when it will resurface, it is available as a tool in any future case when judges need an expedient rationalization for a search that cannot be justified under an established warrant exception. Given the wealth of warrant exceptions that already exist,⁴⁹⁰ handing courts a “go to jail free” card to play in the relatively few situations when they want to admit evidence that does not fall under a categorical warrant exception needlessly adds uncertainty to Fourth Amendment jurisprudence and unfairly allows judges to manipulate doctrine in favor of the prosecution. As a result, the reasonableness-balancing model should have no future: courts should continue following

486. See *supra* notes 24–25 and accompanying text.

487. See *supra* notes 40–44, 52–54, 57 and accompanying text.

488. See *supra* note 56 and accompanying text.

489. See *supra* notes 65–77 and accompanying text.

490. See Bar-Gill & Friedman, *supra* note 272, at 1666 (estimating that only 100,000 of 8.6 million searches conducted each year are warranted searches).

the warrant-presumption model and suppress evidence that is seized without a warrant or warrant exception.

CONCLUSION

Despite the Supreme Court's protestations that the reasonableness-balancing model is its "general," "ordinary," "traditional" approach to Fourth Amendment jurisprudence,⁴⁹¹ and the view expressed by some scholars that the Justices have been using a balancing approach for more than half a century,⁴⁹² in fact *United States v. Knights* ushered in a new era in 2001. The Court's adoption of a freewheeling balancing test to resolve the constitutionality of the search at issue there departed substantially from its prior case law. While earlier decisions had balanced within the framework of the warrant-presumption model, that balancing analysis had generally been confined to evaluating the permissibility of administrative inspection schemes and ruling on the creation and scope of categorical exceptions to the warrant requirement.

Not surprisingly, then, the Justices were able to find very little precedent to support the reasonableness-balancing model, and others' efforts to supplement the Court's work have been similarly unavailing. Although general language appears in a few Supreme Court opinions that arguably supports use of a balancing analysis outside the warrant-presumption framework, those cases derive support for a balancing approach exclusively from warrant-presumption model cases, do not stray far from that model, or have been undermined by later case law. The "touchstone" of the Fourth Amendment may well be reasonableness,⁴⁹³ but, until recently, that did not typically mean the reasonableness-balancing approach.

On the other hand, the academic claims that the reasonableness-balancing model has now taken center stage are likewise overblown.⁴⁹⁴ The Supreme Court has continued to adhere to the warrant-presumption model in most of the decisions issued since 2001 and has even declined several invitations to use a balancing analysis to resolve the constitutionality of a Fourth Amendment intrusion outside the special needs context.

In the wake of *Knights*, *Samson*, and *King*, prosecutors have fared well in the lower courts in cases involving DNA testing and searches of probationers and parolees. But the clear majority of lower court

491. See *supra* notes 45, 55, 80 and accompanying text.

492. See *supra* notes 30–32 and accompanying text.

493. *Maryland v. King*, 569 U.S. 435, 448 (2013) (quoting *Samson v. California*, 547 U.S. 843, 855 n.4 (2006)); *United States v. Knights*, 534 U.S. 112, 118 (2001).

494. See *supra* note 33 and accompanying text.

opinions that resort to a balancing analysis have occurred in those contexts, and, with the exception of foreign intelligence and national security searches, the lower courts have generally been reluctant to expand application of the reasonableness-balancing model into new arenas. Moreover, some courts have been hostile to the balancing approach, refusing to engage in a balancing analysis, requiring the prosecution to satisfy both Fourth Amendment models, or weighing the competing interests in favor of the defendant. To paraphrase Mark Twain's famous quip, reports of the death of the warrant-presumption model have been greatly exaggerated.⁴⁹⁵

That is not to say, however, that the academic criticisms of the reasonableness-balancing model are similarly inflated.⁴⁹⁶ The balancing test is definitely pernicious. It is subjective, malleable, and, at least at the Supreme Court, overly deferential to the government. And because the Justices have never offered to explain why they chose to resolve three cases, and only three cases, using an ad hoc balancing approach, the Supreme Court and the lower courts can keep the balancing model in reserve and call it up whenever they cannot with a straight face find a warrant exception to justify a particular Fourth Amendment intrusion.

The balancing model's track record in the lower courts confirms this scholarly critique. Most of the lower court opinions that declined to use a balancing analysis or weighed the competing interests in favor of the defendant generated divisions within the court itself or with other courts. And the lower court cases in which defendants prevailed under the balancing model were, or could have been, resolved under the warrant-presumption model as well. Even though the reasonableness-balancing model has not left a substantial mark on Fourth Amendment jurisprudence—at least not yet—its history in the lower courts evidences that the balancing approach is inherently indeterminate and that its only real function is to enable judges to find some excuse to refuse to apply the exclusionary rule despite the unavailability of an established warrant exception. Given the shortcomings of the reasonableness-balancing model, courts should continue to adhere to the warrant-presumption model and suppress evidence obtained during warrantless searches that do not fall within any of the categorical exceptions to the warrant requirement.

495. See 2 ALBERT BIGELOW PAINE, MARK TWAIN: A BIOGRAPHY 1039 (1st ed. 1912) (reporting that the famous author, upon learning that his obituary had been mistakenly published, responded with the comment, “[j]ust say the report of my death has been grossly exaggerated”).

496. See *supra* notes 24–27 and accompanying text.